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No. ~~957~~ 119

In the

Supreme Court of the United States

OCTOBER TERM, 1959

ROY E. RICHISON and VERA RICHISON, his wife,
Petitioners,

vs.

DR. LESLIE L. NUNN and ELIZABETH NUNN, his wife,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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THE ARGUS PRESS, SEATTLE

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ROY E. RICHISON and VERA RICHISON, his wife, *Petitioners,* vs. DR. LESLIE L. NUNN and ELIZABETH NUNN, his wife, *Respondents.*	No.....

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

Roy E. Richison and Vera Richison, wife, your petitioners, pray that a Writ of Certiorari issue to review the Judgment of the Supreme Court of the State of Washington, entered in the above entitled case on March 8th, 1960.

OPINIONS BELOW

[Rule 23 (1-a)]

The Opinions of the Washington State Supreme Court, a majority opinion and a dissenting opinion, filed June 18, 1959, have not as yet been printed in the bound volumes of the Washington Reports. However, they are reported in 154 Washington Decisions, page 365, which is the "Official Advance Sheets of the Washington Reports." Also reported in 340 P.(2d) 793. Said opinions are reproduced in Appendix A.

JURISDICTION

[Rule 23 (1-b)]

The judgment of Washington State Supreme Court reversed the judgment of the lower court and dismissed the action. Petitioners had recovered said judgment, in the amount of $71,800.00, on the 16th day of July, 1957, as the result of a unanimous jury verdict which was returned after three weeks of trial. The trial court prior to entering said judgment, heard, considered and denied all of respondents' (defendants in trial court) post-trial motions.

The action was one to recover damages for injuries negligently inflicted upon petitioner wife while she was a patient of respondent doctor during the year 1952.

The judgment of the Washington State Supreme Court, which petitioners seek to review, is dated March 8th, 1960 and the same was entered March 8th, 1960 (See Appendix B).

Petitioners' Petition for Rehearing En Banc was denied January 13, 1960 (See Appendix E).

On the 7th day of March, 1960, the Chief Justice of the Washington State Supreme Court entered an "Order Staying Proceedings" (Appendix F), the essence of which is contained in the following language:

> "ORDER that all proceedings on said judgment are hereby stayed until the certiorari proceedings before the United States Supreme Court are finally determined by that court."

The jurisdiction of this court to review, by certiorari,

the judgment of the Washington State Supreme Court is, in the belief of petitioners, conferred by the provisions of U.S.C. 1958 ed., Title 28, §1257(3). Petitioners contend that said judgment denies to them rights, privileges and immunities, to which they were, and are, entitled under the Constitution of the United States.

Specifically, petitioners contend:

(1) That the judgment of the Washington State Supreme Court has deprived them of their "right to trial by jury" as guaranteed by the 7th Amendment to the United States Constitution, and by Article I, Sections 2 and 21 of the Washington State Constitution. The application of the aforesaid 7th Amendment and *other amendments* to the Federal Constitution, to action by a State, has been considered and will be discussed later in this petition. A question of great public importance is involved in this problem.

(2) That said judgment of the Washington State Supreme Court has deprived them of their property (*i.e.*, judgment for $71,800.00 plus interest and costs) without due process of law, in violation of the 5th and 14th Amendments to the United States Constitution.

(3) That said judgment of the Washington State Supreme Court has denied to them the "equal protection of the laws"; and the effect of said judgment, as to petitioners, who are citizens of the United States, is to "abridge the privileges and immunities of citizens of the United States"; all of the aforesaid constituting a violation of rights guaranteed petitioners by the 14th Amendment to the Constitution of the United States.

QUESTIONS PRESENTED FOR REVIEW

[Rule 23 (1-c)]

1. Can a State, the constitution of which provides:

Article I, § 2:

"The Constitution of the United States is the supreme law of the land."

Article I, § 21:

"The right of trial by jury shall remain inviolate. * * * ."

acting through its highest appellate court, deny to a citizen of the United States, by a 6 to 3 decision, the benefit of a unanimous jury verdict which the trial court sustained, *by the simple expedient of the majority stating in its opinion the non-existence in the record of medical evidence which it asserted was necessary to sustain the judgment, when in truth and fact all of this evidence was in the record, and is set forth verbatim in question and answer form in the minority opinion? In short, can such an appellate court, by a majority vote, make black, white,* by simply asserting that *black is white?* Can the "right to trial by jury" be so destroyed? If it can be so destroyed, is this because we of the United States are now ready to acknowledge that we are "a nation of dictators" and not "a nation of laws"?

2. Has the judgment of Washington State Supreme Court, based on the majority opinion, when considered with the dissenting opinion, denied to these petitioners the "equal protection of the laws"? In this connection, it is to be remembered that the *sole* basis of the majority opinion is the *asserted* non-existence of evidence in the

record, *which in truth and fact was in the record* as shown by the verbatim quotations therefrom as set forth in the minority opinion.

3. Has the judgment of the Washington State Supreme Court abridged "the privileges and immunities" of petitioners, in violation of the 14th Amendment?

4. Has the judgment of the Washington State Supreme Court deprived petitioners of their property without due process of law, in violation of the 5th and 14th Amendments to the Constitution of the United States?

CONSTITUTIONAL PROVISIONS, STATUTES AND COURT RULES

[Rule 23 (1-d)]

The Constitution of the United States, as amended, provides among other things:

Amendment V:

"No person shall * * * be deprived of life, liberty, or property without due process of law; * * *." U.S.C. 1958 ed. p. XLVI.

Amendment VII:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law." U.S.C. 1958 ed. p. XLVI.

Amendment XIV, § 1:

"* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State

deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S.C. 1958 ed. p. XLVII.

U.S.C. 1958 ed. Title 28, § 1257, among other things provides:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * *

"(3) By writ of certiorari, * * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

Enabling Act by which Washington became a State, in § 4, provides:

"That the delegates to the conventions * * * after the organization shall declare, on behalf of the people of said proposed states, *that they adopt the constitution of the United States;* whereupon the said conventions shall be, and are hereby, authorized to form constitutions and state governments, for said proposed states respectively. The constitutions shall be republican in form, and make no distinction in civil or political rights on account of race or color, except as to Indians not taxed, *and not be repugnant to the constitution of the United States and the principles of the Declaration of Independence* * * *." (Italics supplied) United States Statutes At Large, Vol. 25, p. 676 (50th Congress 1887-1889).

Declaration of Independence, among other things, states:

> "* * * The history of the present king of Great Britain is a history of repeated injuries and usurperations, all having in direct object the establishment of an absolute Tyranny over these states. To prove this, let Facts be submitted to a candid world.
>
> * * *
>
> "For depriving us in many cases, of the benefit of Trial by Jury." U.S.C. 1958 ed. p. XXVII.

Washington State Constitution among other things provides:

Article I, § 2:

> "The constitution of the United States is the Supreme law of the land." [1]R.C.W. Vol. 0, p. 43.

Article I, § 21:

> "The right of trial by jury shall remain inviolate * * *." R.C.W. Vol. 0, p. 45.

The Washington State Supreme Court has promulgated Rules Peculiar to the Business of the Supreme Court, and the rule thereof having to do with entry of final judgment, insofar as here material, provides:

> "* * * and every decision of the court whether rendered *en banc* or by a department shall be final 30 days after its filing, unless during such period a petition for rehearing be filed. The filing of such petition within such period shall have the effect of suspending the decision until disposed of by the concurrence of five judges: * * *. Whenever a

[1]R.C.W., as used above, is the designation for Revised Code of Washington.

decision shall become final as herein provided, a judgment shall issue thereon." R.C.W. Vol. 0 (Business of the Court, p. 5)

CONCISE STATEMENT OF THE CASE

[Rule 23 (1-e)]

Supreme Court Rules, Rule 23 (1-e), as applied to this Petition for Certiorari, requires, in the judgment of the writer, explanatory comment (which will be brief), which at first blush, may seem to be more properly contained in the argument provided for by Rule 23 (1-h). However, the writer, understanding that this court is reluctant to grant certiorari to a State Court if by so doing it is required to search the record, feels compelled, at this time, to state to the court the reasons why the granting of this petition will not require this court to search the record, and for the same reason, will not require, at this point, any extended statement of the factual situation.

The evidentiary facts, upon which petitioners rely, are set forth in the minority opinion of the Washington State Supreme Court (Appendix A-22, *et seq.*). A cursory glance at said minority opinion will disclose that the facts appear therein, in question and answer form, as the same appeared in the Statement of Facts (Record of evidence) certified by the trial court (Appendix A-23).

The majority opinion of the Washington State Supreme Court held that there was no medical evidence from which the trier of the fact, *in this case a jury*, could find that the respondent doctor (defendant in the

trial court) was guilty of any negligence either in (1) the performance of the hernia operation, or (2) in post-operative diagnosis and treatment therefor, which proximately caused or contributed to cause the injury and damage of which petitioners complained, and for which they were granted a verdict by the jury, and a judgment by the trial court.

Therefore, only a very brief statement, at this time, of the ultimate facts material to the consideration of the constitutional questions involved, is deemed necessary.

Petitioner wife, a healthy and normal woman who worked outside the home as well as taking care of the household and engaging in church activities, submitted herself in June, 1952, to respondent doctor to undergo a simple operation for the repair of a small femoral hernia. She had undergone previous surgical operations successfully and without any ill effects at the hands of respondent doctor and other surgeons. The foregoing facts are accepted as true by the majority in its opinion (see Appendix A-3).

As petitioner wife was regaining consciousness from a general anesthetic, she was suffering excruciating pain in her left leg, and she made immediate complaint. She has until this day continued to so suffer and ever since the said hernia surgery has been totally disabled from engaging in any gainful occupation, and for by the far greater part of the time, from performing any household duties.

As a result of negligent surgery and negligent post-operative diagnosis and treatment, she suffers from

causalgia or reflex sympathetic dystrophy. It is recited in the minority opinion (Appendix A-32), that at the time of trial, "this diagnosis (causalgia or reflex sympathetic dystrophy) by Dr. Boersma *appears on the hospital records on 11 different exhibits* reflecting 11 different occasions when she was in the hospital under his care."

The medical evidence clearly established that causalgia and/or reflex sympathetic dystrophy result from injury to a peripheral nerve, which nerve is either in whole or in part a sensory nerve. There was medical evidence that in October, 1952, petitioner wife, after having been referred by Dr. Boersma to a number of physicians, underwent an exploratory surgical operation to determine the cause of her pain and disability, which operation was performed by Dr. Frewing. Dr. Frewing testified that he found a branch of the femoral nerve, which in his opinion was a mixed nerve, i.e., part sensory and part motor, bound down to Poupart's ligament. He testified he released said nerve, excised a portion of it and surrounding tissues, and sent such excised specimens to a laboratory for pathological examination. The pathologist's report is in evidence, and it showed that the specimens sent him contained (a) a nerve, (b) cotton suture material, and (c) giant foreign body cells. Respondent doctor's (defendant below) testimony established, as did other testimony, that the cotton suture material found by the pathologist could not have come from any previous surgical procedures performed upon petitioner wife (Appendix A-24 to A-31).

Respondent doctor, in paragraph VII of his Answer (which is quoted in the minority opinion — Appendix A-23), expressly admitted that under the applicable standards of care it was his duty "to avoid injuring the femoral nerve and to avoid sewing it into the incision resulting from such operation."

As clearly set forth in the minority opinion, there was direct, unimpeached testimony of medical witnesses from which the trier of the fact, *in this case a jury*, could find that respondent doctor was (a) guilty of negligence in surgery, (b) guilty of negligence in post-operative diagnosis and treatment, and (c) that his negligence both in surgery and in post-operative diagnosis and treatment was a proximate cause of petitioner wife's condition. The minority quotes the testimony of six medical doctors, including respondent doctor, which clearly establishes the foregoing assertion.

The majority opinion absolutely ignores the aforesaid question and answer medical testimony. The majority opinion deals only in generalities, but even so, it too clearly demonstrates the existence of a jury question. It demonstrates beyond all cavil that the majority constituted itself as the trier of the fact, in violation of the court's long existing rule of construction, which rule is set forth in both opinions.

No claim was made in the Washington Supreme Court that the damages awarded were excessive. Petitioner wife is, without question, an invalid for the rest of her life and presents a tremendous financial burden to the petitioners.

The Constitutions, Federal and State, and the Laws of Washington State, statutory and decisional, when applied to the facts as stated in majority and minority opinions of the Washington Supreme Court, conclusively demonstrate that petitioners have been deprived of rights, privileges and property in violation of rights guaranteed them by the United States Constitution, which will be pointed out later in this Petition under "Reasons for Granting the Writ" (p. 14).

FEDERAL QUESTIONS PRESENTED

[Rule 23 (1-f)]

In the trial court, there was no indication of a threatened invasion of petitioners' constitutional rights, -- so the issue was not presented.

On appeal to the Washington State Supreme Court, appellants' (respondents in this proceeding) filed a 364-page printed brief (see certified record on file in this court) in which they set forth the evidence most favorable to them, thus in effect, *asking the Supreme Court to disregard the verdict of the jury on conflicting evidence* and to constitute itself a jury to weigh the evidence. Petitioners in their answering brief at several places challenged this threatened invasion of their right to a jury trial (said brief is before this court in the certified record. Excerpts from said brief showing petitioners' said challenge are set forth in Appendix C).

As soon as the opinions were filed (June 18, 1959) and petitioners became aware for the first time that the Washington State Supreme Court, acting through a majority of its judges, had in fact violated petitioners'

constitutional rights, they filed, within the time provided by law, on July 17, 1959, a Petition for Rehearing En Banc, *and therein specifically raised the constitutional questions here presented.* (A copy of said Petition for Rehearing En Banc is in the certified record; and nine copies thereof have been separately presented to this court with this petition, all pursuant to Rule 23 (1-i). In addition thereto, petitioners have in Appendix D set forth excerpts from said Petition for Rehearing En Banc which show that these Federal questions were presented to the Washington State Supreme Court).

The Washington State Supreme Court, promptly required appellants (respondents in this proceeding) to answer said petition within 15 days, which they did. Petitioners promptly filed a reply to said answer (said answer and reply are before this court in the certified record). In Appendix G, we set out excerpts from said answer — one from page 1 and one from page 22 wherein petitioners' statement on page 65 of their Petition for Rehearing En Banc (Appendix D-10) which reads as follows:

> "An examination by the United States Supreme Court of the two opinions can lead to only one conclusion, i.e., that the majority constituted itself a jury, and weighed the evidence, thus depriving respondents of their right to trial by jury, as well as denying to respondents due process of law.
>
> "We think also that an examination of the two opinions clearly establishes that in this case, the

majority has denied respondents the equal protection of the laws."

and other statements (p. 60 through p. 68 — Appendix D) are, by respondents, called "threats."

This clearly demonstrates that respondents recognized that Federal questions were presented.

The Washington State Supreme Court entered an order denying the Petition for Rehearing En Banc, without any mention of the Federal questions (Appendix E).

REASONS FOR GRANTING THE WRIT

[Rule 23 (1-h)]

Petitioners claim:

1. That the Washington State Supreme Court has denied them the benefits of a jury trial in violation of the 7th Amendment of the Federal Constitution (*supra*, p. 5) and in violation of Sections 2 and 21 of Article I of the Washington State Constitution (*supra*, p. 7).

2. That the Washington State Supreme Court has deprived them of their property (a judgment) without due process of law in violation of the 5th and 14th Amendments of the Federal Constitution (*supra*, p. 5).

3. That the Washington State Supreme Court has denied to them the equal protection of the laws in violation of the 14th Amendment to the Federal Constitution (*supra*, p. 5).

4. The Washington State Supreme Court has abridged their privileges and immunities as citizens of the United States and of the State of Washington in violation of

the 14th Amendment to the Federal Constitution (*supra*, p. 5).

The aforesaid claims were raised by petitioners in their printed brief filed with the Washington court, which is before this court in the certified record. Excerpts from said brief are contained in Appendix C. Petitioners again presented the questions to the Washington Supreme Court in their Petition for Rehearing, which is before this court in the certified record (9 copies of which will be made available for the convenience of members of the court). Excerpts therefrom are contained in Appendix D.

The special and important reasons (Rule 19) for granting this writ are as follows:

(1) The Washington State Supreme Court has, by ignoring medical testimony in the certified record and by denying the existence of such testimony, denied to petitioners, rights, privileges and immunities to which they are entitled under the Federal Constitution.

(2) The Washington State Supreme Court, by its judgment, ignored the applicable decisions of this court, and its own prior decisions.

(3) If the Washington State Supreme Court can, by the methods it employed, destroy the right of trial by jury and or the benefits of a jury trial, then every other state court can by like methods destroy the right of and benefits of trial by jury.

7th Amendment to Federal Constitution Is Applicable

Justice Harlan (1897), speaking for this court in the case of *Chicago B. & O. R. Co. v. Chicago*, 166 U.S. 226, 41 L.ed. 979, said at p. 987 (L.ed.):

> "It is clear that the last clause of the 7th Amendment is not restricted in its application to suits at common law tried before juries in courts of the United States. *It applies equally to a case tried before a jury in a state court and brought here by writ of error from the highest court of the state.* * * * It could not have been intended thus to restrict the power of the courts of the United States to re-examine facts tried by juries *in the courts of the Union, and leave it open for those courts to re-examine, in disregard of the rules of the common law, facts tried by juries empaneled in the state courts in cases which, by reason of questions involved in them, could be brought under the cognizance of the courts of the United States.*
>
> "In *New York v. United States*, 76 U.S. 274, 9 Wall. 274, 278, * * * this court said:
>
> "'It seems to us also that cases of Federal cognizance coming up from state courts, are not only within the words, but are also within the reason and policy of the amendment. *They are cases involving questions arising under the Constitution.* * * * and therefore are completely within the exercise of the judicial power of the United States, as much so as if the cases had been originally brought in some inferior Federal court'." (Emphasis supplied)

To the same effect see, *Backus & Sons v. Fort Street Union Depot Co.*, 169 U.S. 557, 42 L.ed. 853; *Missouri*

K. & T. R. v. Haber, 169 U.S. 613, 42 Led. 878; *Shelley v. Kraemer*, 334 U.S. 1-23, 92 Led. 1161 at 1181. Research indicates that the foregoing cases have not been overruled.

Washington State and the United States By Compact Made the 7th Amendment Applicable to State Actions

The 50th Congress of the United States passed the Enabling Act (*supra*, p. 6) by which Washington became a state. The Act was approved February 22, 1889. See United States Statutes at Large, Volume 25, page 676. Section 4 of that Act required the delegates to the Constitutional Convention to "declare on behalf of the people of said proposed states, that they adopt the Constitution of the United States; * * *." That Act also required that the State Constitution "not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence * * *." The Declaration of Independence (*supra*, p. 7), in enumerating various grievances, stated, "for depriving us in many cases of the benefit of trial by jury." U.S.C. 1958 Ed. p. XXVII.

Washington adopted a Constitution in conformity with the requirements of said Enabling Act, and provided therein:

Article I, § 2:

"The Constitution of the United States is the Supreme law of the land." (*supra*, p. 7)

Article I, § 21:

"The right of trial by jury shall remain inviolate." (*supra*, p. 7)

The Washington State Supreme Court, in a unanimous *en banc* decision, in *Boeing Aircraft Co. v. R.F.C.*, 25 Wn.(2d) 652, 171 P.(2d) 838, in discussing the legal effect of the Enabling Act and the Washington State Constitution which followed, said at p. 842 (Pacific Reporter):

> "* * * However, after the state had accepted the terms of the Enabling Act by framing and passing a Constitution, and Congress had approved the Constitution, and the President of the United States had issued a proclamation to the effect, each government was bound by the provisions of that Enabling Act."

14th Amendment Makes 5th and 7th Amendments Applicable to State Actions

In the following cases, this court has held that the last clause of the 14th Amendment implemented other earlier amendments.

In *Milk Wagon Drivers v. Meadowmoor Dairies*, 312 U.S. 287-321, 85 L.ed. 836, this court said (85 L.ed. 841, 843):

> "Still it is of prime importance that no constitutional freedom, *least of all the guaranties of the Bill of Rights, be defeated by insubstantial findings of fact screening reality. That is why this Court has the ultimate power to search the records in the state courts where a claim of constitutionality is effectively made.* And so the right of free speech cannot be denied by drawing from a trivial rough incident or a moment of animal exuberance the conclusion that otherwise peaceful picketing has the taint of force.
>
> * * * * * * * *

> "To maintain the balance of our federal system, in so far as it is committed to our care, *demands* at once *zealous regard for the guaranties of the Bill of Rights* and due recognition of the powers belonging to the states." (Emphasis supplied)

See also, *Feiner v. New York*, 340 U.S. 315-331, 95 L.ed. 295; *Niemotko v. Maryland*, 340 U.S. 268-289, 95 L.ed. 267; *Local Union No. 10, A.F. of L. v. Graham*, 345 U.S. 192, 97 L.ed. 946; *Hoag v. New Jersey*, 356 U.S. 464, 2 L.ed.(2d) 913.

Washington State Violates Its Own Rule of Decisions

The majority opinion (Appendix A-2) and the minority opinion (Appendix A-22) cite *Traverso v. Papa*, 51 Wn.(2d) 149, 316 P.(2d) 462, in stating the rule of decision which has always existed in the State of Washington, to-wit:

> "A challenge to the sufficiency of the evidence, of course, admits the truth of the opposing party's evidence and all inferences that reasonably can be drawn therefrom, and requires that the evidence be interpreted most strongly against the moving party and in the light most favorable to the party against whom the motion is made."

The majority, after correctly stating the rule, proceeded to completely ignore it, by denying the existence in the certified record of evidence which evidence is set forth in the minority opinion. This court in the case of *Yick Wo v. Hopkins* (1886) 118 U.S. 356 at 373, said:

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and

administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

In *Patterson v. Pennsylvania Railroad Co.* (CCA 6th) 238 F.(2d) 645, this court commented on the problem here involved, stating at page 650:

"Some of us have noted a modern tendency — perhaps a growing one—to give mere lip service to these sound principles. *Trial by jury is our established constitutional safeguard against assumption of unwarranted judicial authority and should be honored by steadfast observance rather than discarded by dictatorial breach.*". (Emphasis supplied)

In *Shelley v. Kraemer* (1948) 334 U.S. 1, 92 L.ed. 1161 at 1181, *et seq.*, this court, in an opinion written by Justice Vinson, said:

"The short of the matter is that from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference, *includes action of state courts and state judicial officials.*

* * * * * * * * *

" * * * State action, as that phrase is understood for the purpose of the Fourteenth Amendment, refers to exertions of state power in all forms. And *when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands.*

* * * * * * * * *

"* * * Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." (Emphasis supplied)

Palko v. Connecticut, 302 U.S. 319-329, 82 L.ed. 288, at 293, emphasized that the trial must be a real one and not a sham or pretense. In *Powell v. Alabama*, 287 U.S. 67, 68, 77 L.ed. 169, 170, defendants were granted a new trial "*when in truth*, though not in form, they were refused the aid of counsel." In *Milk Wagon Drivers v. Meadowmoor Dairies*, 312 U.S. 287-321, 85 L.ed. 836, this court directly held *that constitutional guaranties should not be defeated by insubstantial findings of fact screening reality.* We think the denial of the existence in the record of evidence which in truth and fact is in the certified record, falls within the reasoning of said cases.

Power of the Federal Supreme Court to Disregard The Conclusions of State Courts and to Search the Records Before State Courts in Cases Where Denial of Constitutional Rights Is Claimed

Petitioners claim violation of their rights under the 5th Amendment, the 7th Amendment, and the last clause of the 14th Amendment, to the Federal Constitution. This claim of violation of their constitutional rights was effectively made as soon as the denial of such rights became apparent (Petition for Rehearing—see excerpts thereof, Appendix D). In effect, appellants' (respondents here) brief in the Supreme Court of Washington urged that the court disregard the verdict of the jury and petitioners in their answering brief (see

record for respondents' brief,—see excerpts thereof, Appendix C) pointed out the threatened deprivation of their right to the benefits of the jury's verdict.

Petitioners, having timely and effectively complained of the violation of their constitutional rights, urge upon this court that under the cases later cited, this court has the power and the duty to:

1. Refuse to be bound by the conclusions of the state court;

2. To re-examine the evidentiary basis upon which such conclusions are founded;

3. To make an examination of the evidence to ascertain independently whether constitutional rights have been violated;

4. To examine the records to determine if crucial findings by the state court had a reasonable basis in the evidence;

5. To examine the evidence to determine if the state court in reaching its conclusion had in fact met its own prior established standards;

6. To prevent a state court from defeating the substance of a constitutional claim by a mere denial of it.

Milk Wagon Drivers v. Meadowmoor Dairies, 312 U.S. 287-321, 85 L.ed. 836; *Brown v. Western Railway of Alabama*, 338 U.S. 294-303, 94 L.ed. 100; *Feiner v. New York*, 340 U.S. 315-331, 95 L.ed. 295; *Niemotko v. Maryland*, 340 U.S. 268-289, 95 L.ed. 267; *Stroble v. California*, 343 U.S. 181, 96 L.ed. 872; *Local Union No. 10, A.F. of L. v. Graham*, 345 U.S. 192, 97 L.ed. 946;

Hoag v. New Jersey, 356 U.S. 464, 2 L.ed.(2d) 913; *Napue v. Illinois*, 360 U.S. 264, 3 L.ed.(2d) 1217; *Davis v. Virginian R. Co.*, 4 L.ed.(2d) 366 (Advance Sheet No. 6, February 15, 1960) (U.S. citation not available); *Bailey v. Central Vermont R. Co.*, 319 U.S. 350, 353, 354, 87 L.ed. 1144, 1147.

A Judgment Is "Property" Under The 14th Amendment

Pennsylvania v. Wheeling Bridge Co., 18 How. 421, 15 L.ed. 435; *McCullough v. Virginia*, 172 U.S. 102, 43 L.ed 382; *Collins v. Welsh* (CCA 9th) 75 F.(2d) 894, 897; *Martinez v. Fox Valley Bus Lines, Inc.*, 17 F. Supp. 576; *Ladner et al. v. Siegel* (No. 4) (Pa.) 148 A. 699, 702; *Commissioner of Sinking Fund etc. v. City of Philadelphia* (Pa.) 324 Pa. 129, 188 A. 314, 316; *Pennsylvania Co. etc. v. Scott*, 346 Pa. 13, 29 A.(2d) 328.

It Is the Function of the Jury, Not of the Court, to Weigh Medical Evidence

The Washington State Supreme Court, in its majority opinion (Appendix A-21), said:

> "* * * Finally, there was no *agreement of doctors* that an injury to this or any other nerve was the cause of plaintiff's trouble." (Emphasis supplied)

In *Scutilles v. Inter-Caribbean Shipping Corp.*, 4 L.ed. (No. 2) 142 (Advance Sheet of December 7, 1959) (U.S. citation not available), in discussing the right of a jury to make the ultimate finding as to causation with respect to personal injuries, at page 144, the court said:

> "* * * Neither can it (jury's power) be impaired

by the lack of medical unanimity as to the respective likelihood of the potential causes of the aggravation, or by the fact that other potential causes of the aggravation existed, and were not conclusively negated by the proofs." (Parenthetical matter supplied)

* * * * * * * * *

At p. 144;

"* * * * The members of the jury, not the medical witnesses, were sworn to make a legal determination of the question of causation."

* * * * * * * * *

At p. 145:

"* * * * It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain references. * * * The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. *Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.*" (Emphasis supplied)

The opinion in this case is urged as conclusive in petitioners' favor, on every point raised by petitioners in this petition.

Petitioners Have Been Denied the Equal Protection of the Laws

The Washington majority opinion has in effect held that this plaintiff was required to produce a medical

witness to categorically testify that in his opinion the defendant doctor was negligent. The dissenting opinion takes note of this when it states (Appendix A-39):

> " * * * that any absence of direct testimony as to such conclusion is not essential in this case; that the rule of the 'chain of circumstances' again here applies."

Prior to the decision in this case, the Washington State Supreme Court held that when (1) evidence of the standards of practice had been received, and (2) evidence of the defendant doctor's conduct had been received, the jury was entitled to determine whether the defendant doctor's conduct was in compliance with the standards of practice, or constituted a departure therefrom; and that the jury determined the ultimate fact of negligence,—not the medical witness. Thus it appears that the rule in Washington prior to this decision is identical with the rule recently announced by this court in *Scutilles, supra*. Prior Washington cases supporting the rule are: *Helland v. Bridenstine*, 55 Wash. 470, 104 Pac. 626; *Swanson v. Hood*, 99 Wash. 506, 170 Pac. 135; *Marlowe v. Patrick*, 181 Wash. 647, 44 P.(2d) 776; *Jordan v. Skinner*, 187 Wash. 617, 60 P.(2d) 697; *Gross v. Partlow*, 190 Wash. 489, 68 P.(2d) 1034; *Atkins v. Clein*, 3 Wn.(2d) 168, 100 P.(2d) 1; *Hill v. Parker*, 12 Wn.(2d) 517, 122 P.(2d) 476; *Cornwell v. Sleicher*, 119 Wash. 573, 205 Pac. 1059.

None of the aforesaid Washington cases were overruled or modified by the majority opinion in this case; and none of said cases were even mentioned except the case of *Marlowe v. Patrick*, 181 Wash. 647, 44 P.(2d)

776, and when the majority opinion did mention that case, it attributed to that case the facts in the case of *Swanson v. Hood*, 99 Wash. 506, 170 Pac. 135. This curious happenstance was called to the attention of the Washington State Supreme Court in the Petition for Rehearing, page 22 *et seq.*, without avail.

Petitioners contend that the majority decision has denied to them the equal protection of the laws, in that it applies to their particular case, totally different rules of law than have heretofore been applied to similar cases; and that the former rules of law, *under which this case was tried*, inasmuch as they have not been overruled or modified, will no doubt be applied to other litigants in the future.

Recently, the state court of Virginia attempted to do substantially the same thing that the majority opinion of the Washington State Supreme Court actually did in this case, but this court saw to it, by issuing its Writ of Certiorari, that justice could not be denied in such a manner. See *Davis v. Virginian R. Co.*, 4 L.ed.(2d) 366 (Advance Sheet No. 6, February 15, 1960) (U.S. citation not available).

In the preparation of this petition, and in order to keep it within a proper length, we have not attempted to discuss the evidentiary facts in detail. We deemed that unnecessary because of the great amount of question and answer testimony which is set forth in the minority opinion. We assure the court that there is a great deal more of such testimony in the record which can and will be pointed out to this court in our brief when we are granted a Writ of Certiorari.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Certiorari should be granted.

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APPENDIX A

OPINIONS OF THE SUPREME COURT OF THE STATE OF WASHINGTON

154 Washington Decisions 365

No. 34496. *En Banc.* June 18, 1959.

ROY E. RICHISON *etal., Respondents,* v. DR. LESLIE L. NUNN *etal., Appellants.*

Appeal from a judgment of the Superior Court for Clark county, No. 31104, Poyhonen, J., entered July 16, 1957, upon the verdict of a jury rendered in favor of the plaintiffs, in a medical malpractice action. Reversed.

McMullen, Snider & McMullen, for appellants.

Kennett, McCutcheon & Soderland and *William C. Klein,* for respondents.

ROSSELLINI, J.—This is a medical malpractice action. The complaint alleged that the defendant doctor (who will be referred to as the defendant) had negligently sewed a nerve into soft tissue adjacent to the surgical incision which he made for a hernia operation performed upon the plaintiff wife (who will be referred to as the plaintiff) in June, 1952; that he negligently failed to discover that he had so sewed a nerve into soft tissue; that he did not possess and use, in the performance of the hernia surgery, the knowledge and care ordinarily and customarily possessed and used by surgeons in Vancouver and similar communities in that he failed to locate the nerves in the area of the operation and in that he failed to avoid sewing the nerve into the adjacent soft tissue and injuring the nerve. It was further

alleged that the plaintiff, by reason of the defendant's conduct was caused to suffer excruciating and agonizing pain of which the defendant was promptly advised, and that the defendant then and there failed and refused to make an examination to determine the cause of such pain; that the defendant refused daily to examine the plaintiff to determine the cause of her excruciating pain, but on the contrary, required her to stand and walk and negligently failed to treat said injury and the resulting pain and suffering. As a result of the defendant's negligence, it was alleged that the plaintiff had become permanently disabled. Damages in the sum of $180,700 were asked.

After a lengthy trial, the cause was submitted to a jury, which returned a verdict in favor of the plaintiff. The defendant appeals from the judgment entered thereon, assigning error to the denial of his various motions directed to the insufficiency of the evidence to sustain the verdict.

[1] A challenge to the sufficiency of the evidence, of course, admits the truth of the opposing party's evidence and all inferences that reasonably can be drawn therefrom, and requires that the evidence be interpreted most strongly against the moving party and in the light most favorable to the party against whom the motion is made. *Traverso v. Papo*, 51 Wn. (2d) 149, 316 P. (2d) 462.

[2-6] The burden was upon the plaintiff to prove one or more of the allegations of negligence and that such negligence was the cause of her disability. It is well settled that, before a physician or surgeon may be held

liable for malpractice, he must have done something in the treatment of his patient which the recognized standard of medical practice in his community forbids in such cases, or he must have neglected to do something required by that standard. In order to sustain a judgment against a physician or surgeon, the standard of medical practice in the community must be shown, and, further, that the doctor failed to follow the methods prescribed by that standard. Negligence on the part of the physician or surgeon by reason of his departure from the recognized standard of practice must be established by medical testimony. An exception to this rule is recognized where the negligence is so grossly apparent that a layman would have no difficulty in recognizing it. *Harspool v. Ralston*, 48 Wn. (2d) 6, 290 P. (2d) 981, and cases cited therein. In such cases the courts, in effect, apply the doctrine of *res ipsa loquitur* which shifts the burden of proof to the defendant when the injury is one which does not ordinarily occur without negligence. *Olson v. Weitz*, 37 Wn. (2d) 70, 221 P. (2d) 537. The facts of this case do not bring it within this exception, as the following summary of the evidence will show.

The plaintiff's evidence, which we accept as true, tended to show that prior to the herniorrhaphy which the defendant performed in June, 1952, she had been in reasonably good health and had recovered without incident from a hysterectomy and ovariotomy which the defendant had performed in 1951.

The plaintiff's hernia developed in the left inguinal area as a result of a fall which she sustained on the basement stairs in her home. After a period of observation

and conservative treatment, the defendant recommended surgery, to which the plaintiff consented. She was told by the defendant that this would be a comparatively simple operation from which she should recover quickly. The defendant and his assistant testified to the procedure which he followed in performing the herniorrhaphy, a procedure which his medical witnesses testified was proper and according to the accepted standard. The plaintiff offered no medical evidence to the contrary.

Also, the plaintiff offered no medical evidence that the post operative care given the plaintiff, as shown by the hospital records, was less than or different from that required by the accepted standards of practice. The only medical evidence on this matter was produced by the defendant, whose witnesses testified that the procedures conformed to the applicable standard.

The plaintiff, however, testified that when she awoke from the anesthetic, she was screaming with pain, and the defendant conceded that this was not the usual reaction. There was also evidence in the hospital records that she complained frequently of pain in her leg and operational area during her stay in the hospital. She testified that though she complained to the defendant of intense pain, he did not examine the incision but simply explored the area by hand pressure without removing the bandage. (The plaintiff makes much of this testimony and the jury's right to believe it; however, the record is devoid of any evidence that such an examination would have revealed anything helpful in diagnosing the cause of the plaintiff's distress.) She testified further that the defendant told her to get up

and walk and that if she would do so, the pain would go away. The defendant admitted that he had so admonished her, in accord with his usual practice of encouraging early ambulation. There was no evidence that this practice was contrary to the standard or that it was improper in the plaintiff's situation.

After the plaintiff returned home from the hospital and the stitches had been removed, she continued to suffer pain in her leg and complained of this to the defendant. He diagnosed her complaint as left sciatica and committed her to the hospital for ice-bag applications and diathermy. If this diagnosis was unwarranted at the time or if the treatment given was improper or had any adverse effect on the plaintiff's condition, such facts are not disclosed by the record. The testimony of Dr. Boersma, the doctor whom she consulted a few weeks later and who remained her physician until the time of trial, indicates that the diagnosis was not unwarranted by the symptoms she displayed at that time. He stated that, on his first examination, his impression was that she might be suffering from some type of sciatic neuritis "secondary to something else."

After her release from the hospital, according to the plaintiff's testimony, she continued to complain of pain, but the defendant told her there was nothing wrong with her and that her husband humored her too much, and that if he did not stop it, she would never "come out of it," that she would lose her mind entirely and he would send her to Steilacoom. She conceded that, in spite of this casual diagnosis, he had sent her to an X-ray therapist, but she received no relief from the first treatment and did not return for her second

appointment. The defendant recommended she see a psychiatrist and told her he could do nothing further for her. She refused to take his advice and went instead to Dr. Boersma, also a general practitioner in Vancouver. This was five weeks after her herniorrhaphy.

Dr. Boersma, like the defendant, was unable to satisfactorily diagnose the plaintiff's trouble and referred her to a neurologist, who concurred with the defendant's conclusion that the cause was subjective and found no evidence of involvement of the femoral nerve or complication in her surgical procedure. His recommended procaine injections having produced no satisfactory relief, the plaintiff was referred to an internist in Portland, who could find no explanation for her problem and could think of no reason why it should be caused by the surgery.

A few weeks later the plaintiff was referred to Dr. Frewing, a surgeon, who performed an exploratory operation in the region of the scar, and found an unusual amount of scarring (there is no suggestion that this was due to any negligence on the part of the defendant) and a small structure partially encased in the scar tissue and adherent to Poupart's ligament. In order to discover the nature of this structure, he performed a pinching test which revealed it to be a motor nerve which was not functioning below the area of encasement. Dr. Frewing formed the impression that the nerve might be in part sensory ("superficial cutaneous of the thigh"). His explanation of the result of the pinching test was given in these words: "I felt that this was part of the scarring process that was in

this area [indicating] and this particular nerve was bound down a little more firmly than some others."

A microscopic examination of a specimen of the excised tissue which Dr. Frewing submitted to the University of Portland pathology laboratory revealed a small nerve encased in scar tissue and a large amount of suture material. While the plaintiff showed improvement after this operation, her symptoms later returned, and there was no evidence that any of the doctors attributed her disability to the adherence of the nerve to the ligament, or attributed this adherence to the manner in which the operation was performed.

During the following year and half, the plaintiff was hospitalized with various illnesses. Meanwhile she continued to complain of pain in her left leg but was not treated for this condition when she was hospitalized for other unrelated conditions. Then on March 6, 1954, the plaintiff was referred to a neurologist at the University of Oregon, who, for the first time, diagnosed her condition as reflex dystrophy of causalgic type, with the scar area as the probable source of irritation. (This is significant to the plaintiff's case, because it is her theory that she was suffering from reflex dystrophy from the time of the operation and that it was caused by the encasement of the motor nerve.).

After the neurologist, Dr. Livingston, expressed his opinion that the plaintiff was suffering from a reflex sympathetic dystrophy, with the scar area as the probable source of irritation, she was examined by Dr. Haugen, Dr. Livingstone's associate, who differed with

Dr. Livingston to the extent that he thought the obturator nerve was involved. The two doctors recommended procaine injections, the same treatment which had been recommended and tried without success in October, 1952.

July 20, 1954, the plaintiff was referred to Dr. Davis, a neurosurgeon, for evaluation. His opinion was that she was suffering from an irritative nerve phenomenon associated with involvement of branches of the femoral nerve at the time of her initial surgery. "She is," he reported to Dr. Boersma, "developing many of the findings of a causalgia or at least a reflex sympathetic dystrophy." The doctor testified that the expression "involvement of branches of the femoral nerve" described a reflex mechanism and did not mean that a nerve had been injured.

After the examination by Dr. Davis, the plaintiff was admitted to the hospital for a tonsillectomy, and a month later, she was readmitted with symptoms of extreme weakness, dizziness, weakness of the right arm, and pain in her left leg. No diagnosis was made on that admission. December 13, 1954, an electroencephalogram was made and was reported normal. On January 18, 1955, a left lumbar sympathectomy was performed by Dr. Davis, after a sympathetic block had produced some relief. This operation, regarded as often beneficial in the relief of reflex sympathetic dystrophy, afforded no lasting relief to the plaintiff.

On April 21, 1955, she was again admitted to the hospital, for three days this time, with a diagnosis of

anxiety tension state. On September 7, she was given a clinical trial of ultrasonic therapy for the relief of pain which had to be discontinued because it produced colonic attacks. She was again hospitalized from September 14 to October 10, 1955, with a paralysis of the entire left lower extremity. This was diagnosed by a psychiatrist as conversion hysteria and was successfully treated by hypnosis. Apparently, this was the only psychiatric treatment ever administered to the plaintiff.

Thereafter, the plaintiff's symptoms continued and her doctor, at a loss to prescribe further treatment, referred her to the Mayo Clinic, Rochester, Minnesota. After her examination there, he received the following report from Dr. John G. Mayne of that clinic:

"Thank you for referring your patient, Mrs. Roy E. Richison to the Mayo Clinic. It was my pleasure to conduct her general examination and at my request she was seen by Doctor Parker of the department of neurology, Doctor Uihlein of the department of neurosurgery, Doctor Hines of the department of peripheral vascular diseases, Doctor Hunt of gynecology and Doctor Rome of the department of psychiatry. As you are fully aware of her primary complaint, I will not repeat this in detail. I shall state in brief that she told me her primary complaints were recurring, sharp jabbing pain involving, particularly the inner aspect of the left leg from the "incision" down and laterally "up" the leg to the thigh. Secondarily, she complained of migratory areas of burning sensation like pins and needles over the entire left leg and thirdly, she complained bitterly of the appearance of the left leg with its dependent edema.

"Many of the details of her past history strongly

suggested hysterical symptoms. Thus, she mentioned that 2½ years ago she had felt so 'weak' one morning that she went back to bed and at noon was found by a neighbor so weak that she 'just didn't care what was going on.' She tells me that she was a patient in the hospital for four months at that time and was told that she had had a heart attack.

"She has had shaking spells ever since she had had her 'nerve injured in 1952.' The duration of the spells will vary from five minutes to a few minutes more or less and may recur many times per day. She also complained bitterly of dyspareunia due to pain in the left thigh and that this has been another source of great concern to her and to her husband.

"The significant findings on her physical examination, in addition to the evidences of her previous surgery, were the change in size of the left lower extremity which was definitely larger than the right and was slightly more cyanotic than the right. She had a marked 'touch-me-not' reaction involving the entire left leg which made examination somewhat difficult. There was some lipedema bilaterally, the left leg was warm and dry, and the examination otherwise within normal limits.

"The routine laboratory studies of her blood and urine were within normal limits. A. Papanicolaou smear of the cervix was negative. An x-ray of the chest was negative as was the x-ray of the left leg, including the foot and ankle.

"Doctor Hines, who saw Mrs. Richison, felt that from her history she may well have had an ileofemoral thrombophlebitis, postoperatively and that the changes resulting from this were superimposed on the mild lipedema now, including the edema and enlargement of the left lower extremity, was due to a combination of a

mild chronic venous insufficiency and lipedema. He felt that there was an element of 'post-phlebitic neurosis' but that this did not explain all of her distress. We advised that she wear an adequate elastic support but felt that she would not do this because of her complaints of hypersensitivity of the extremity.

"Special studies by Dr. Parker of the department of neurology were completely negative, and it was his impression that her symptoms were primarily those of a conversion hysteria. Doctor Rome of the department of psychiatry agreed that hers was primarily a hysterical reaction to her original injury and he advised that we continue the use of thorazine, 50 mg. four times daily, for some additional help. Mrs. Richison seemed quite upset at our recommendation that she be seen by a psychiatrist and I doubt that she will follow any of the recommendations we have made.

"I am sorry that we could not be of more help to Mrs. Richison in solving her problems. I do feel that she will have the best chance of gaining relief of her symptoms if she will accept psychiatric help."

Shortly before the trial, the plaintiff was examined by two Portland doctors at the request of the defendant. X-rays which they took showed no demineralization of the bone. The following day she was readmitted to a Vancouver hospital, where she remained throughout the trial. She appeared at the trial only once, when she was brought, on a stretcher, to give her testimony.

In an effort to substantiate her theory of the cause and nature of her condition, the plaintiff took the deposition of a Dr. Bonica of Tacoma, who had written a book called "The Management of Pain," first published in 1953. In this treatise, Dr. Bonica discussed at

some length the disease known as causalgia and the disease known as reflex sympathetic dystrophy, of which causalgia is a particularly severe type, rarely occurring except as a result of battle wounds. Dr. Bonica, treated as an adverse witness by the plaintiff's counsel, testified at great length about the nature and causes of this disease and the theories regarding it. *He stated that the reason he wrote the book was because the matters contained in it were not at that time standard practices, and cases of reflex dystrophy were, in many instances, not recognized by the average practitioner, nor did he know how to diagnose them nor did he know much about treatment.*

Dr. Bonica testified that a literal translation of the term reflex sympathetic dystrophy is "that there is a dystrophy consequent to sympathetic hyperactivity which results as from an abnormal reflex mechanism." One form of reflex sympathetic dystrophy is due, he said, to a major injury to a major peripheral nerve. Other forms of reflex sympathetic dystrophy are or may be due to injury to various structures, usually in the extremities, and the processes initiated by irritation of nerve endings which cause a disturbance in the spinal cord and result in signs of symptoms. None of the mechanism of causalgia, he said, has ever been proved but certain treatments have given relief. The doctor's own theory was that tissue damage, whatever may be the agency producing the damage, initiates a reflex disorder which in some way involves the sympathetic nervous system. In his own experience, he had found that certain types of minor reflex sympathetic dystro-

phy may be produced by *surgical scars*, and by *damage to small peripheral nerves*, and that he had found it following surgical amputation of fingers, excision of the ganglia of the wrist, plastic operations of the hand or foot, insertion of an infusion needle into the median nerve, extravenous injection of pentothal sodium, and injection of alcohol into or around a nerve. A trauma, whether it be mechanical or chemical, may produce this condition. However, injury to a motor nerve would not produce it. He testified that an early diagnosis and treatment of the disease is important, since if it progresses to the point where demineralization of the bones occurs (as often happens), its course is irreversible.

The symptoms characteristic of reflex sympathetic dystrophy, according to Dr. Bonica's expert testimony, are, a burning pain in the early stages, discoloration of the skin, and localized swelling, followed by a lessening of the pain and edema and the occurrence of trophic changes (changes in the skin). In the third stage, pain disappears and the trophic changes become more marked. There is demineralization of the bones, detectible by X-ray, accompanied by limitation of motion. This third stage is the stage in which the course of the disease becomes irreversible. Development of the disease can be prevented in some instances, he said, by (1) treatment at the site of injury, (2) early and adequate relief of pain with analgesic block, and (3) proper psychologic support of patient.

Dr. Bonica testified that he was not a surgeon and not familiar with the standard of medical practice applicable to herniorrhaphy and proper postoperative care.

He did testify that in his opinion when a patient complains of pain, the doctor should not assume that it has no organic basis. He also testified that if a patient is actually suffering from reflex sympathetic dystrophy, it will not help him to threaten to put him in an insane asylum.

[7] An examination of this evidence reveals no basis on which the jury could determine that the defendant's surgical procedure and treatment of the plaintiff not according to the accepted standard or that his negligence caused the condition which developed in her leg. There is evidence that the scar may have been the irritant which set up the reflex reaction (if the diagnosis of reflex sympathetic dystrophy was correct) or that injury to peripheral nerves, if there were such injury may have caused it. But there is no evidence that the scarring or the supposed injury to nerves was the result of negligence.

[8] Dr. Bonica testified that the average practitioner does not have the knowledge to recognize reflex sympathetic dystrophy, and the record of diagnosis in this case amply supports that testimony. Can it be said then, that the defendant was negligent in failing to make this diagnosis—a diagnosis which was first made two years after he last saw the patient? We think that clearly it cannot. It should be remembered that immediately after her operation, pain was the only symptom of which the plaintiff complained. It was not until other symptoms of reflex sympathetic dystrophy began to develop, long after she had discontinued the services of the defendant, that such a diagnosis was made. Doubt

is thrown on the correctness of this diagnosis by the fact that, five years after the onset of her pain, she had not developed the characteristics of the third stage of the disease, that is, demineralization of the bones and subsidence of pain.

[9] Neither can the defendant be held liable for failing to properly treat a disease which he could not reasonably be required to recognize. It is significant that the treatment recommended by the Mayo Clinic was essentially that recommended by the defendant, namely, psychiatric assistance. The neurologist at this clinic found no nerve involvement, and another doctor attributed her ailment in the first instance to a postoperative iliofemoral thrombophlebitis. (The term was not explained at the trial, but according to Blakiston's New Gould Medical Dictionary, this is an inflammation of the veins in the iliofemoral area resulting from a thrombus or clot.) There is no medical opinion in the record, nor any other evidence, that had the defendant used a different surgical procedure, or made a different diagnosis of the plaintiff's postoperative trouble and prescribed a different treatment, her disability would have been avoided or corrected. The evidence simply discloses a result which has baffled general practitioners and specialists alike, and for which no treatment has been successful.

The plaintiff admits the lack of direct medical testimony but contends that since a nerve was found encased in the soft tissue, and injuries of nerves may

cause reflex sympathetic dystrophy, and there was evidence that the plaintiff developed reflex sympathetic dystrophy, the "chain of circumstances" rule should apply. This rule is set forth in *Crouch v. Wyckoff*, 6 Wn.(2d) 273, 107 P.(2d) 339, wherein we said:

"We recognize the rule that, in a malpractice action, it is not necessary to prove negligence by direct and positive evidence, but it may be proved, in certain cases, by a chain of circumstances, from which the ultimate fact required to be established is reasonably and naturally inferable; and in such cases, it is unnecessary to have the opinion of persons skilled in the particular science to show negligent treatment, but the facts alone prove negligence. [Citing cases]. However, a reading of the cited cases will show that, under the facts established in each case, the negligent act, such as leaving a sponge in the body after an operation, or a spring from an instrument used by the doctor, was so apparent that no expert testimony was necessary to establish the negligence, that being established by the facts alone."

[10] The rule in malpractice actions is that a surgeon is not liable merely because of a bad result. He is not responsible in damages in a malpractice suit if the treatment which he employs is that which is recognized and approved by those reasonably skilled in his profession, practicing in the same neighborhood and in the same line of practice, and if he administers that treatment with a degree of skill and diligence such as practitioners ordinarily exercise in like cases. *Crouch v. Wyckoff*, *supra*; *Brant v. Sweet Clinic*, 167 Wash. 166, 8 P.(2d) 972.

The testimony of all the medical witnesses who were questioned concerning the technique employed by Dr. Nunn was to the effect that, in treating the respondent, he used that degree of care and skill required by the above rule, and there is no testimony to the contrary.

The difficulty with the plaintiff's theory is that the only evidence of negligence is the bad result which followed the operation, that is, the continuing pain and subsequent edema and changes in the appearance and temperature of the skin. On the basis of this result, plus the fact that a nerve was found encased in scar tissue, and an expert's opinion that damage to a nerve may cause reflex sympathetic dystrophy, the plaintiff contends that the jury was entitled to infer that the operation was negligently performed and that it was this negligence which produced the ensuing pain and other symptoms. This assumes that the jury could determine the cause of her disability when the physicians, including specialists, who examined her subsequent to the operation were unable to agree on its cause or even a diagnosis.

[11] The illogic of this assumption illustrates the validity of the principle that a bad result is not, in itself, evidence of negligence. As this court said in *Gray v. Sweet*, 155 Wash. 374, 284 Pac. 803, the law is well settled that facts relating to difficult surgical operations call for knowledge far beyond the ordinary layman, and resort must be had to testimony of expert witnesses for light on the subject of whether or not the defendant has been guilty of negligence.

[12] The testimony of other physicians that they would have followed a different course of treatment than that followed by the defendant, or a disagreement of doctors of equal skill and learning as to what the treatment should have been, does not establish negligence. In such cases, the court must hold that there is nothing upon which the jury may pass, the reason being that the jury may not be allowed to accept one theory to the exclusion of the other. *Fritz v. Horsfall*, 24 Wn. (2d) 14, 163 P.(2d) 148, and cited cases.

[13] This is not a case in which the medical men called to testify for the plaintiff are in agreement with each other as to the diagnosis or cause of the plaintiff's condition, but are in disagreement with those who testify for the defendant. In such a case, the jury is entitled to choose between the conflicting testimony. But in this case, the doctors called to testify on behalf of the plaintiff were not in accord in their diagnosis of her condition, much less in their theories of its cause, and Dr. Frewing, in anticipation of an exploratory operation, went so far as to state: "I hardly know what one could expect to find to explain such a picture as the patient presents."

What was found was a small branch nerve, which the doctor concluded was a motor nerve, encased in scar tissue, a piece of suture in its vicinity, and an unusual amount of scarring. None of these findings was attributed by this or any other doctor to improper operational procedure, nor was it ever shown that the encased nerve was the source of the plaintiff's trouble. If it was a motor nerve, it could not have been the cause of her

pain according to the testimony of the plaintiff's expert, Dr. Bonica. While she experienced some relief after the exploratory operation, in a short time all of her symptoms returned. There was no explanation given as to why the exploratory operation would give temporary but not permanent relief.

[14] The testimony of Dr. Bonica presents interesting information regarding the disease known as reflex sympathetic dystrophy, but it affords no basis for a finding that the defendant was negligent. Dr. Bonica did not testify that the disease results from negligence in the performance of operations and other medical procedures but simply that the injury necessarily involved in the operation may produce this result. The reason why it does in some cases, and does not in the majority of others, so far as the evidence in this case discloses, is not known.

[15] A jury would have to resort to speculation and conjecture in order to find that the plaintiff's symptoms were the result of the encasement of the motor nerve in scar tissue and that such encasement was due to the employment of an improper operational technique on the part of the defendant or the performance of the operation in a negligent manner. This is a type of speculation which, so far as the record reveals, was not indulged in by any of the doctors who examined her for the purpose of diagnosing and treating her condition.

The plaintiff cites the case of *Marlowe v. Patrick*, 181 Wash. 647, 44 P.(2d) 776, and urges that, upon

the authority of that case, the verdict of the jury should be sustained. In *Marlowe v. Patrick, supra*, the defendant had performed a mastoidectomy and in the performance of the surgery had unnecessarily injured the facial nerve. While there was medical testimony that this could happen accidentally, the doctor admitted that he had drilled holes in the bone too large for the screws used in placing the plate, and, for that reason, wrapped the plate and the bone with a wire, and that the wire caused the trouble. The court held that the jury was entitled to infer that the injury to the nerve was caused by negligence, rather than by accident. Among the features which distinguish that case from this are: (1) that there was medical testimony that the facial nerve was not necessarily involved in the operation; (2) that the source of the plaintiff's trouble was undisputed; and (3) that the defendant admitted that he had made a mistake in the operation.

[16] In this case it is true that, on cross-examination, the defendant acknowledged that a surgeon, in performing a herniorrhaphy should avoid injuring the femoral nerve or its branches because of the harmful results which may follow. This cannot be taken as an admission that the standard of practice required a surgeon to avoid injuring any nerve branch, however, since the defendant also testified, and the other medical witnesses who were questioned concerning the matter concurred that it is impossible to avoid cutting and disturbing the branch nerves in the area encompassed by the incision that is necessary in an operation of this type. Even a layman would recognize the truth of this.

Furthermore, there is no medical testimony, or any other testimony, to the effect that the nerve branch which was found encased in scar tissue, which was so small that it was not visually identifiable, was in an area not properly involved in an operation for the repair of a left inguinal hernia. The record is also devoid of any admission by the defendant that he sewed the nerve in question into the soft tissue or injured it in any way. So far as the evidence shows, it is as likely that the nerve had become encased through the natural formation of scar tissue as it is that it was encased in suturing. In fact, it was the impression formed by the surgeon who later explored the area that the encasement was the result of scarring. Finally, there was no agreement of doctors that an injury to this or any other nerve was the cause of the plaintiff's trouble.

This court recognizes that it is difficult to obtain medical testimony to substantiate a plaintiff's claim in a malpractice suit, as physicians are reluctant to testify against each other. But this does not obviate the necessity of such testimony where the fact of negligence is not apparent to the layman. Until some better system of determining the issue is evolved,[2] plaintiffs will have to produce such evidence if they are to prevail in suits of this nature.

There is no question but that the plaintiff is suffering and has suffered great pain and discomfort, but it is apparent the jury allowed the natural sympathy which it undoubtedly felt for the plaintiff's misfortune

[2] The problem involved and possible solutions are discussed at length in 30 Temple Law Quarterly 359-401 (Summer 1957).

to lead it to make assumptions which were not justified by the evidence. The plaintiff having failed to sustain the burden of proving that her disability was the result of the defendant's negligence, the judgment must be reversed.

It is so ordered.

WEAVER, C. J., MALLERY, HILL, DONWORTH, and OTT, JJ., concur.

HUNTER, J. (dissenting)—As stated by the majority, in order to sustain a judgment against a physician or surgeon, (1) the standard of medical practice in the community must be shown; (2) that the physician or surgeon failed to follow the methods prescribed by such standard; (3) that the negligence on the part of the physician or surgeon by reason of his departure from the recognized standard of practice was the cause of the disability. The foregoing elements must be established by medical testimony unless they are so apparent that a layman would have no difficulty in their recognition.

The majority conclude that there was no medical evidence to establish these elements, as asserted by the respondent, as applied to the instant case, and that no exception to the rule can be here applied. I disagree.

A challenge to the sufficiency of the evidence, as stated by the majority, admits the truth of the opposing party's evidence and all inferences that reasonably can be drawn therefrom; and requires that the evidence be interpreted most strongly against the moving party and in the light most favorable to the party against

whom the motion was made. *Traverso v. Papa*, 51 Wn. (2d) 149, 316 P.(2d) 462.

Applying these rules, the answer to the proper determination of the case lies in the record which will be examined as it applies to the proof of the above elements essential for the respondent to prevail.

Evidence of standards of medical care existing in Vancouver at the time of the asserted violation appears in the record. Dr. L. L. Nunn (who will be referred to as the appellant) admitted in paragraph VII of his answer as follows:

"Defendants deny each and every allegation of Paragraph VII of plaintiffs' complaint, save and except that they admit that under the standards of care required of physicians and surgeons in Vancouver, Washington, it was and is the duty of a physician performing a surgical operation for the removal of a femoral hernia to avoid injuring the femoral nerve and to avoid sewing it into the incision resulting from such operation." The appellant testified as follows:

"Q. . . . I notice in your answer, doctor, Paragraph 7, the answer you swore to in this case, you say this: 'Admit that under the standards of care required of physicians aand surgeons in Vancouver, Washington, it was and is the duty of a physician performing a surgical operation for the removal of a femoral hernia to avoid injuring the femoral nerve and to avoid sewing it into the incision resulting from such operation.' Now, my question is, why does the standard of practice place that duty upon the surgeon? A. Well, simply because he wants to avoid any injury to structures which he shouldn't injure. Q. Is it fair, doctor, to say that when

you perform surgery to repair a femoral hernia in a female that you know that if you sever the femoral nerve or one of its branches, and you have mentioned certain branches, or sew it into the tissues adjacent to it, by that I mean the femoral nerve, into the tissues adjacent to the area, or damage it or the branches of it which you have mentioned, that your patient will in all probability suffer some undesirable results such as paralysis, anesthesia, paresthesia, or inflammation of the nerve or the branch affected, is that fair? A. Fair enough."

The foregoing evidence establishes an accepted standard by which the appellant was required to abide in the performing of the herniorrhaphy upon the respondent Vera Richison. Evidence of the violation of the above standards in the performance of the herniorrhaphy by the appellant appears in the record as follows:

Dr. H. Frewing testified:

"Q. Now your post-operative diagnosis of scarring left groin, extensive, tell us what you found that led you to make that portion of your post-operative diagnosis? . . . A. As I dissected below the skin and towards the deeper structures in this operative area, I found that there was more than the usual scar formation in this region below Poupart's ligament. As we go through tissue in this area, we are accustomed to find a good deal of fatty tissue. There are many additional fibres of lymph channels and lymph nodes, *and it is unusual to see firm attachment of the skin to these deeper structures.* That was the first note I made that there was *more than the usual scar formation below Poupart's ligament in the region* and here I would like to interject a correction for the typographical work, perhaps it was my dictating and perhaps the stenographer's fault, but in

any event, the word 'vasa ovalis' is used. The — that should be 'fossa ovalis.' f-o-s-s-a. Q. I think I developed that before. A. Yes, however, the fossa ovalis is an anatomical area overlying the femoral artery and vein just below Poupart's ligament, and I use the term here to indicate the area where I found more than usual scarring below Poupart's ligament. I extended that remark in my report, extending along the nerves and vessels. *That means as I went deeper in my dissection in this operative area, I found that this scarring extended down around the vessels and nerves. Q. And how far down — what was the depth to which you did go in this dissection; measuring from the skin downward? A. I would estimate perhaps one and a half inches. It was to a layer deep to behind the vessels.* Q. Then after you exposed the femoral nerve and, I assume, when you are using that term here, well, I won't assume anything. I'll ask you. When you use the term femoral nerve in this exhibit, Number 11, to what did you refer? A. I refer to the femoral nerve trunk and *its principal branches in that area.* Q. And did you visualize the femoral nerve as you have thus defined it to us? A. Yes, sir. Q. What did you find? A. *I found there was no evidence of possible scarring or involvement of the nerve except for one branch which seemed to be adherent under Poupart's ligament.* I am hard put to describe accurately to you what Poupart's ligament looks like. It's a thick layer of — oh, not quite tendon. It's fascia-like tissue, maybe that doesn't mean any more. It's a firm, gristly type of material that goes across the groin here (indicating). Behind that I found one branch of nerve which was different from the others. Q. Now where with reference to the lower border of Poupart's ligament, did you find this condition that you described? A. My, — excuse me, as I refresh myself. I note that I released this nerve from the pos-

terior border of Poupart's ligament, because the change in terms there, that's why I asked you to explain, sir. Q. Well, if this is the ligament sir, I shouldn't use anything that big, and I know it's not this big, true, but posterior means the back? A. That's right, sir. Q. And what I'm talking about, elevation, I'm describing lower border as being part part nearest the feet, the upper border being the upper part nearest the head. *Now where on the back side or posteriorly, where with reference to the lower border did you find this situation? A. I would say I found it in that area where normally one would expect to find the femoral nerve, which is towards the side laterally from the femoral artery and at a point approximately halfway from the anterior-superior spine to the lower attachment of the symphysis of the Poupart's ligament.*" (Italics mine)

Dr. Frewing further testified:

"Q. What did you observe as to what — as to the manner of adherence of this nerve to the ligament? A. I have no detailed note as to the exact manner of attachment. I would assume from my record that it was attached in ordinary fibrous scar tissue such as I had been contending with throughout the remainder of the exploration of this area. Q. How close was the nerve to the ligament itself? A. I have noted that I released it from the posterior border of Poupart's ligament. That would mean that it was immediately adjacent to the ligament. Q. For what distance, and it was surrounded, as I understand it, with scar tissue? A. That would be a reasonable feeling. Q. You released it in what method? What did you do to release it? A. We use instruments in our operation, I would think. Now, I do not have note as to the particular instrument I used at this time, but I would be using scissors or hemostats or thumb forceps or even sometimes a scalpel, a knife,

Q. And do I understand that you cut scar tissue in some manner or other to release the nerve? A. Yes, sir. Q. And what length of the nerve was there imbedded in the scar tissue? A. I have to rely on memory there. *I could say perhaps one-quarter inch.* Q. Now, you took specimens of this tissue and caused them to be sent to the laboratory for evaluation and diagnosis, didn't you? A. I took three specimens from this operation, and sent them to the pathological laboratory. Q. Now, after you had released this nerve, during this surgery, did you make some test of the nerve? A. Yes, sir. Q. Describe what you did and — A. As I explored this area, I ran into various strands which it was impossible with the naked eye to identify positively. They could have been lymph channels; they could have been vessels, either veins or arteries; they could have been fibrous tissue or they could have been nerve. In the case of this particular object which I had, I did what I had done on some of the other fragments or strands I had in front of me. I pinched it lightly with the hemostat or a forcep — that is an instrument we use in surgery to grasp small objects or vessels, to control bleeding, and we acquire a certain facility of pinching gently with it. When I pinched this nerve, there was a contraction of one of the muscles in front of the thigh. Q. That indicated that you then and there —. A. That I was dealing with a nerve, sir. Q. You were dealing with a motor nerve, sir, weren't you? A. Yes, sir. Q. And that motor nerve goes to a muscle and not to the skin surface, doesn't it? A. Not necessarily, sir, that segment which I was stimulating was going to a nerve — going to a muscle, but I had no assurance in this area that I didn't have a mixed nerve which would have parts going to the skin and to the muscle. Q. Fine, very good, sir. Mixed nerves, then, carry both motor and sensation fibres, don't they? A. Yes, sir. Q. So that an injury to a

mixed nerve may produce sensation of pain and may also impair muscle function? A. Yes, sir. Q. Now I assume that you have — we'll put it this way. When you came to sewing up, suturing, I believe you doctors call it, the wound that you had to make for this operation, what type of needle did you use, what shape is the needle? A. That depends, Mr. Kennett, on the area in which we are working, down deep we use a curved needle, what we call a half curve, semi-circular type needle. Q. Like this, Doctor, (indicating)? A. That order; perhaps not quite so much curve, but a curving needle. Q. So that if you put a curved needle, it has the suture material attached to it, doesn't it? A. Yes, sir. Q. Cotton, silk, whatever the surgeon has elected to use? A. That is right. Q. If you go through a ligament with that curved needle, the purpose of the curve is so that the business end — A. Sharp end. Q. — will go through and then you turn it and then it comes back out and you make the suture fast? A. That is right. We grasp the needle when it comes out and pick it up with our instrument. Q. And then tie your knot? A. Tie the knot. *Q. So that if there was this nerve lying right down close and adjacent to the structure to which you put your curved needle, it would be quite simple matter to pick that nerve up and sew it in there, wouldn't it?* A. With your assumptions, yes." (Italics mine)

The findings of Dr. Frewing appear in the hospital record (exhibit No. 11) as follows:

"Findings: There was more than usual scar formation in the low Poupart's ligament in the region of the vasa ovalis and extending along the nerves and vessels. There is no evidence of herniation. The external oblique fascia was tightly closed and there was no evident defect, neuroma or other pathology underlying the ex-

ternal oblique. The vein and the artery were both soft, of normal consistency and readily compressed. There was no evidence of unusual communication or extravasation. The artery in particular, had considerable scarring around. The femoral nerve and its branches was exposed, the ligaments and then through the femoral ring into the retroperitoneal area. *There was no evidence of possible scarring or involvement of the nerve except for one branch, which was apparently in part, superficial cutaneous of the thigh and in part, motor to the upper portion of the sartorius muscle. When this branch was released from the posterior border of Poupart's ligament, there was some thickening.* Compression of the nerve, distal to the thickening caused contraction of the upper portion of the sartorius. However, compression of the same nerve above the thickened area, did not cause contraction of the muscle. This area of nerve was excised and sent to the pathologist for study. In addition, two other specimens, comprising scar, left node or foreign body from just below Poupart's ligament were sent to the pathologist." (Italics mine)

The findings of the pathologist which appear in exhibit No. 11 are, in part, as follows:

"Specimen C, labelled small nerve and scar or suture, identifies a small nerve with surrounding collagenous connective tissue; there are also large portions of suture material with surrounding foreign body giant cells.

"Diagnosis: Segments of ligament and collagenous connective tissue with small nerve and with suture material and foreign body reaction."

Referring to the tests given by Dr. Frewing on the nerve adherent to Poupart's ligament, Dr. Davis testified on direct examination, as follows:

"Q. Well, would the test evidence some injury or damage of some kind to the nerve? A. To the branch, yes."

Dr. Davis further testified:

"Q. You are speaking now about the type of work that you as a neuro surgeon does knowingly with respect to a nerve? A. Yes, sir. Q. Do you make a practice of sewing the nerve ends into the soft tissues and to the scar? A. No, sir."

Dr. Frewing testified in reference to the result of the pinching test of the nerve:

"Q. Have you any explanation of why you had that result? A. I felt that this was part of the scarring process that was in this area (indicating) and this *particular nerve was bound down* a little more firmly than some others."

On cross-examination, the following question and answer appears:

"Q. Did you — you did not mean that there was a branch nerve there that you would not ordinarily find in another person? A. I was not surprised to find this branch. There is ordinarily a branch [interruption]"

If the jury could infer from the above evidence that a branch of the femoral nerve was sewn into the soft tissue at the time the appellant was suturing the incision, the standard of care required in the Vancouver area in the performance of such an operation would have been violated irrespective of the absence of a statement by a medical witness that it had been violated. The testimony is clear that a branch of the femoral nerve was adherent to the underside of Poupart's liga-

ment. It was encased in scar tissue, and suturing material was present; it was surrounded with foreign body giant cells which is nature's way of protection from the invasion of a foreign body; the branch of the femoral nerve is not normally attached to Poupart's ligament; the injured branch was not a mere small cutaneous or surface sensory nerve; it was one and one-half inches beneath the surface of the skin and beneath Poupart's ligament; it was where a surgeon could have and should have, with the exercise of reasonable care, observed and discovered it as did Dr. Frewing in his exploratory operation. The evidence is of such clarity that any layman could conclude that this branch of the femoral nerve, where it was found attached to Poupart's ligament, was there by virtue of its having been sewed into the soft tissue when the appellant doctor sutured the incision. The "chain of circumstances" rule as set forth in *Crouch v. Wyckoff*, 6 Wn. (2d) 273, 107 P. (2d) 339, cited by the majority applies. This constituted negligence for which the appellant was liable if any harm resulted to the respondent therefrom.

The testimony is clear that the respondent was in reasonably good health before her operation which was performed by the appellant; that immediately after the operation, upon coming out of the anesthetic, she was in extreme pain at the site of the incision and she has, almost continuously, endured pain ever since; that she was operated on for hernia on June 21, 1952. The record discloses substantial testimony that she thereafter suffered from a condition known as reflex dystrophy or

causalgia; and that this condition was a result of the hernia operation.

Dr. Davis testified:

"Q. And I note on her medical chart that on the occasion of this hospitalization the admitting diagnosis was causalgia post traumatic, left leg. Do you find that? A. Yes, sir. Q. That was your diagnosis, pre-operative diagnosis? A. Yes, sir. Q. And the final diagnosis was the same? A. Yes, sir. Q. And what did this diagnosis mean, Doctor? A. Merely that she had a causalgia or causalgia-like syndrome.

"Q. Well, in any event, it was your opinion that her causalgia-like symptoms were a result of a trauma to her left leg? A. Depends on what you mean by 'trauma.' Q. What did you mean by it — that is what I am trying to get at, Doctor — when you wrote it in on the medical chart? A. Apparently this woman had developed an irritative type or irritative symptoms following an operative procedure. Q. Referring to the hernia operation? A. Yes, sir. Further than that I do not know."

Dr. F. Boersma, the respondent's physician who saw her fairly continuously within about six weeks after the hernia operation, diagnosed her condition as reflex dystrophy. This diagnosis by Dr. Boersma *appears on the hospital records of eleven different exhibits*, reflecting eleven different occasions when she was in the hospital under his care. The diagnosis of Dr. Kenneth E. Livingston, staff physician, appears in the hospital record (exhibit No. 41) as causalgia-post traumatic left leg.

Dr. Boersma testified as follows:

"A. Then on the 30th, September the 30th [1952], have a telephone conversation; she was very miserable. She did come to the office that day to take the films that had been taken the day before and deliver them to Dr. Selling. We had taken AP and lateral films of the pelvis and of the lumbosacral spine. I have a notation here of a tremendous emotional ailment, *believe that may have an organic basis following surgical procedure so closely.*

"Q. Is the jury to understand that as of now your diagnosis of reflex sympathetic dystrophy still holds good? A. Yes, it does." (Italics mine.)

Dr. Edward Kloos, who made a neurological examination of the respondent, testified as follows:

"Q. Did you come to any conclusion or form any opinion from your examination and the history which she related to you and the information that you had as to whether or not Mrs. Richison was suffering from a condition known as sympathetic reflex dystrophy? A. That is a loose term, yes, I think she probably was. It depends on one's interpretation of that."

The remaining link in the chain to be considered to determine the question of liability to be placed upon the appellant as a result of the operation is a showing that the respondent's condition of causalgia or reflex dystrophy was proximately caused by the appellant's negligence in injuring the branch of the femoral nerve in the performance of the herniorrhaphy. On this issue the following testimony by the appellant appears in the record:

"Q. Well, then, see if we can shorten it. It is a medical fact, is it not, that a patient may suffer reflex sympathetic dystrophy when that patient has not

suffered trauma to a major peripheral nerve trunk? A. Yes. Q. Which means that a patient who suffers trauma to a branch of a major peripheral nerve may suffer from reflex sympathetic dystrophy? A. May? Q. Yes, do you agree? A. That is right."

Dr. J. Bonica testified:

"Q. If it occurs to a patient, that is if causalgia follows to that patient, why it's some pretty real, isn't it? A. Yes, if it's due to an injury, of course. Q. *Does the pain of causalgia occur often immediately after the injury?* A. *Yes.* Q. *I want to ask you, Doctor, to give me the characteristic symptoms of causalgia*, and I am looking at Page 950 of your book, if that will speed it up any. A. Well, I would have to remind myself. *It's a pretty classical picture. Severe, almost always severe, burning pain, that is the characteristics, associated with hyperalgesia, hyperesthesia, vasamotor disturbances and subsequent tropinic changes of a marked degree.* Q. All right. I want to ask you, in addition to that, if another symptom is erratic alteration of the disposition and emotional state of the individual? A. Yes. Q. And I want to ask you if, in addition to that, if sudomotor disturbances is not another symptom? A. Yes. Q. And I want to ask you with refereñce to the pain which is symptomatic, if the following, using your language again, is still your present opinion: 'Pain, which is usually continuous, severe, poorly localized, irradiating and burning in quality and easily exacerbated by peripheral and central (emotional) stimulation—.' A. Yes. Q. In early cases of causalgia, is it your present opinion as follows: '*In the early and or milder cases the pain is limited within the territory of the injured nerve, but in severe and or prolonged cases the pain, while most intense in the autonomous zone of the affected nerve, has a characteristic, diffuse, irradiating,*

poorly localized distribution well beyond the confines of the nerve.' A. Yes. Q. I want to ask you if with causalgia the pain from a partial lesion to a nerve— A. I would like to insert 'major nerve' in there, please. Q. Let me rephrase the question. Dealing with causalgia, if pain from a partial lesion to a nerve is not promptly relieved, may it spread to the entire extremity and to other parts of the body? A. I would still like to qualify by saying 'major nerve,' yes. Q. I thought under your definition of causalgia it had to be that, so I— A. Yes. Q. I am following your answer is 'Yes?' A. Yes." (Italics mine.)

Dr. Kloos testified further as follows:

"Q. Now I note in your report; and I am reading from Page 2 of it, you say that on examination it appeared the skin of the entire left leg was extremely hypersensitive to even the very slightest touch. I assume that is a truthful statement? A. To the best of my knowledge, it is. Q. Well, you were examining her. You could tell whether she was sensitive or not, couldn't you. A. Yes. Q. And that was, she was extremely hypersensitive to the very slightest touch, right? A. Yes. Q. And that extended well up into the flank and the left lower quadrant of the abdomen, didn't it? A. Yes. *Q. And that would be the site of the original hernia operation and Dr. Frewing's corrective operation, wouldn't it? A. And above.* Q. Now from all of your investigation, referring again to your report, the second paragraph and the second sentence thereof, you learned that following her hernia surgery she had immediate severe burning lancinating pain in the entire left lower extremity, didn't you? A. Yes." (Italics mine.)

Dr. Davis testified further as a result of his examination of Mrs. Richison:

"A. There was a healed scar over the groin. She was quite tender around this. Actually it was rather difficult to examine her because of her very wide spread tenderness. There was a—let me put it this way: In testing her sensation there was what we would term a hyperesthesia. In other words, she was more sensitive to stimulation such as pin pricks or touch over a wide area in her leg, perhaps a little more sore over the inner surface of the thigh. The leg was sligltly colder on the left than on the right and it was, it was a little different in color in that it tended to have a slightly mottled, purplish color change which was more apparent perhaps in the foot than the upper leg.

"*Q. After examining the patient did you come to a tentative diagnosis, Doctor? A. Yes. I thought this was a causalgic-like syndrome. I could come to nothing more definite than that. Sometimes with an irritative lesion these people get involvement of their sympathetic nervous system, and she seemed to show some of the evidences of sympathetic irritation. Q. Is that, medically speaking, a reflex sympathetic dystrophy? A. Yes, sir.*

"Q. Doctor, what opinion did you reach on this first occasion concerning the cause of this causalgic-like pain? A. She apparently had an irritative scar. At least her main tenderness was there. And I thought it was perhaps on the basis of an irritative scar. Q. An irritative nerve phenomena? A. Certainly the nerves were involved, yes. Q. What nerves, Doctor, in your opinion? I mean I know you didn't operate on her leg—. A. She had findings which involved the whole leg. In other words, she had both femoral and sciatic involvement, a very diffuse thing. *Her major hyperesthesia and tenderness appeared to be in the saphenous division of the femoral. Q. Is the saphenous nerve a*

separate or of a separate origin from the cord or is it a lower branch of the femoral? A. It is a branch of the femoral.

"Q. Now, I am going to ask you again if it was then your opinion on July 20th, 1954, that this woman, Mrs. Richison, has an irritative nerve phenomena associated with involvement of branches of the femoral nerve at the time of her initial surgery? A. Yes, there may have been some involvement of small sensory branches.

"Q. I have some old charts, maybe, instead of new ones. That is what I was trying to enlighten myself on. All right. Now, a while ago you used the term 'causalgic.' Would you explain the meaning of that word? A. The term itself is—I believe it comes from the Greek and it means a burning pain. It was, I think, first used probably by Weir Mitchell in his description of causalgias that occurred during the Civil War, and he described a burning type of pain due to an irritative disturbance in which there was a great deal of sympathetic nerve activity with sometimes increased sweating, sometimes decreased, change in temperature, color, skin, so on. Q. And the irritative process involves what structures of the body? *A. Usually in order to get a causalgia there is some involvement of nerve fibers.*

"Q. . . . Will any trauma to the nerve which interferes with its continuity, although not completely so, be a possible cause of causalgia? A. Yes. Ordinarily causalgias develop in injuries where the nerve continuity is not completely disrupted. It may occur with very minor injuries." (Italics mine.)

A letter to Dr. Boersma from Dr Davis stated as follows:

"On examination, she shows marked tenderness over

the left inguinal region and a hyperesthesia which seems to be primarily in the saphenous nerve distribution. She is very tender over the scar. The leg is somewhat discolored and tends to be a little purplish and there is some edema around the ankle. The leg particularly below the knee is somewhat colder than the right.

"As I mentioned to you over the phone, I think *this woman has an irritative nerve phenomenon associated with involvement of branches of the femoral nerve at the time of her initial surgery.* She is developing many of the findings of a causalgia or at least a reflex sympathetic dystrophy. . . ." (Italics mine.)

Dr. Bonica testified further:

"A. Yes, that is. Q. I mis-spoke myself. I take it. I will ask it again. Is it still your present opinion that in the overwhelming majority of cases of causalgia the nerve lesion is incomplete? A. Yes.

"Q. I said, if a nerve was sewed, sutured—. A. Oh, yes. Q. (continuing)—to a ligament so that it adhered to the ligament and scar tissue formed around it, that would be an incomplete lesion, would it not? A. Of the nerve? Q. Yes. A. Yes."

From the above medical testimony, it would appear that the facts are so obvious that a layman could conclude that causalgia is caused by nerve damage; that the pain was in the area of an injured branch of the femoral nerve, near the nerve trunk; that the result of such a nerve injury would probably cause harmful results to the sympathetic nervous system and produce causalgia; that the respondent suffered with causalgia as a result of the operation. The chain of circumstances or facts,

as testified to by medical witnesses, would justify the jury as laymen to infer that the condition with which the respondent suffered following the operation was proximately caused by appellant's violation of the standards of medical practice in Vancouver, in damaging a branch of the femoral nerve by negligently sewing it into the soft tissue; that any absence of direct testimony as to such conclusion is not essential in this case; that the rule of the "chain of circumstances" again here applies. *Crouch v. Wyckoff, supra,* cited in the majority opinion. Also, see *Marlowe v. Patrick,* 181 Wash. 647, 44 P.(2d) 776.

The remaining assignments of error made by the appellant to the proceedings in the trial court were not reached by the majority. However, an examination of the record discloses it does not support the contentions raised by these assignments.

The trial court should be affirmed.

FINLEY and FOSTER, JJ. (dissenting) — We dissent. The evidence was sufficient to take the case to the jury.

APPENDIX B

SUPREME COURT OF THE STATE OF WASHINGTON

ROY E. RICHISON, *et ux.*, RESPONDENTS, v. DR. LESLIE L. NUNN, *et ux.*, APPELLANTS. No. 34496.

JUDGMENT

This cause having been heretofore submitted to the court, upon the transcript of the record of the Superior Court of Clark County, and upon the argument of counsel, and the Court having fully considered the same and being fully advised in the premises, it is now, on this 8th day of March, A.D. 1960, on motion of McMullen, Snider and McMullen, of counsel for appellants, considered, adjudged and decreed, that the judgment of the said Superior Court be, and the same is hereby reversed; and that the said Dr. Leslie L. Nunn and Elizabeth Nunn, his wife, have and recover of and from the said Roy E. Richison and Vera Richison, his wife, the costs of this action taxed and allowed at Two thousand, five hundred seventy-nine and 50/100 ($2,579.50) Dollars, and that execution issue therefor. And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

[CERTIFIED COPY IS IN THE RECORD]

APPENDIX C

EXCERPTS FROM BRIEF OF RESPONDENTS

[See Brief of Respondents in certified record from Supreme Court of the State of Washington, *at the pages indicated.*]

The following excerpts have implicit in them the constitutional questions discussed in this Petition for Certiorari:

[Brief p. 7]

With respect to the negligence of appellant subsequent to the hernia operation in failing to properly diagnose and properly treat respondent's painful and disabling condition, the evidence presented *many issues of fact which it was the province and duty of the jury to resolve.* (Italics supplied).

[Brief pp. 98-99]

We start with the well-recognized rule of this court that respondents' judgment must be affirmed if there is any substantial evidence or reasonable inferences arising from such evidence sufficient to support the verdict and judgment. In so doing, this court must view the evidence in the light most favorable to the respondent. *This court must recognize that the jury had the right to accept in whole or in part, or to reject in whole or in part, the testimony of any and all witnesses. Therefore, if there is evidence which will, with the reasonable inferences arising therefrom, support the verdict, the judgment entered thereon must be affirmed, unless there be some reversible error with respect to matters of law.*

The weight of the evidence was for the jury to determine and not for this court.

The credibility of witnesses was for the jury to determine, and not for this court.

Appellants' brief is written with the evident purpose of enticing respondents into joining issue with respect to the weight of the evidence; and *with the evident purpose of enticing the members of this court into constituting themselves a jury for the purpose of weighing the evidence.* **Respondents refuse to be so enticed.** *This court will likewise refuse to be so enticed, because to do otherwise would be to overrule hundreds of previous decisions of this court.* (Italics supplied).

[Brief p. 101]

Happily we have (notwithstanding appellants' 364-page brief) a few very simple questions for determination, which are as follows:

(1) Was there substantial evidence from medical witnesses which entitled the jury to find for respondents on the question of negligence and proximate cause?

[Brief p. 107]

The *jury* had the right to believe the testimony of the respondent to the effect that appellant never even looked at or examined her operative scar until the day he took the stitches out and discharged her from the hospital. *It* also had the right to believe respondent's testimony that thereafter, while she remained a patient of appellant, that he, the appellant, never examined her nor made any tests of any kind to determine the cause of complaints. (Italics supplied).

[Brief p. 144]

Respondent proved the standards of practice by medical witnesses (Bonica, Davis and Appellant). By other

testimony (Respondent, Appellant, and Ex. 9 and 10) appellant's failure to comply with these standards was shown. *This made a case for the jury under the decision of this court in Atkins v. Clein, 3 Wn.(2d) 168.* (Italics supplied).

APPENDIX D

EXCERPTS FROM RESPONDENTS' PETITION FOR REHEARING EN BANC, PRESENTING A FEDERAL QUESTION. See certified record from Supreme Court of the State of Washington at pages indicated. For the convenience of the Court nine copies of the entire aforesaid Petition for Rehearing En Banc, are separately presented to the Court, pursuant to Rule 23 (f).

[Petition pp. 21-22]

Under the law as *heretofore* existing in this state, as hereinafter set forth, respondents are entitled to have their judgment *affirmed* by this court.

We respectfully suggest that if this court now desires to build an *impregnable* fortress around every medical doctor, that it should forthrightly say so, and overrule all of its previous decisions with respect to the effect of circumstantial evidence in medical malpractice cases. The denial to these respondents of the benefit of the existing law, *without overruling prior decisions*, amounts to (a) a denial of "due process of law," (b) a denial of the "equal protection of the laws," (c) a denial of "a right to trial by jury."

Inherent in the majority opinion, and particularly in the next to the last paragraph thereof, reading as follows:

> "This court recognizes that it is difficult to obtain medical testimony to substantiate a plaintiff's claim in a malpractice suit, as physicians are reluctant to testify against each other. But this does not ob-

> viate the necessity for such testimony where the fact of negligence is not apparent to the layman. Until some better system of determining the issue is evolved, plaintiffs will have to produce such evidence if they are to prevail in suits of this nature." (154 Wash. Dec. 382)

we find some indication that *perhaps* this court is about to give medical doctors *complete immunity* in all malpractice cases. This possibility is made more patent (for the benefit of the members of the court who have not read the cited articles in 30 Temple Law Quarterly 359-461) by the fact that the majority cites this "law review" in total disregard of the court's previous decisions. The contributors to this article are, (1) General Counsel for American Medical Association, (2) a medical doctor of Oakland, California, who devotes a lot of time to malpractice cases; (3) 2 radiologists, (4) an obstetrician and gynecologist, (5) a professor of surgery, and (6) Belli.

Heretofore, this court *has never said* that it was necessary in a medical malpractice case to produce a medical witness to categorically say, "*In my opinion the defendant was negligent.*" The majority opinion, in effect, now says just that, as recognized by the writer of the dissenting opinion (p. 389). The majority opinion, in effect, says that the jury may *not* conclude that 1 + 1 = 2, unless a doctor under oath swears that 1 + 1 = 2.

We strenuously urge that once evidence of the standards of practice has been received, and evidence of the defendant doctor's conduct has been received, the jury

is entitled to determine whether defendant's conduct was in compliance with the standards of practice,—or a departure therefrom. The *jury determines the ultimate fact of negligence, not the medical witness.*

See: *Holland v. Bridenstine*, 55 Wash. 479; *Swanson v. Hood*, 99 Wash. 506, at 513; *Marlowe v. Patrick*, 181 Wash. 647, at 653; *Jordan v. Skinner*, 187 Wash. 617; *Gross v. Partlow*, 190 Wash. 489, at 493; *Atkins v. Clein*, 3 Wn.(2d) 168; *Hill v. Parker*, 12 Wn.(2d) 517, at 529.

[Petition pp. 60-68]

The Majority Opinion Denies Respondents the Right of Trial by Jury

The Washington State Constitution, Article I, Section 2, provides as follows:

> "The constitution of the United States is the Supreme law of the land."

Article I, Section 21, provides:

> "The right of trial by jury *shall remain inviolate* * * *."

Presently, we shall discuss provisions of the Constitution of the United States. At this time, in order to understand what the framers of our State Constitution meant when they used the phrase "*shall remain inviolate*," we turn to the 7th Amendment to the Constitution of the United States, which provides as follows:

> "In suits at common law where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, *and no fact tried by a jury shall be re-examined* in any court of the United States than according to the rules of the common law."

The provisions of our State Constitution above set forth became into being because of the provisions of Section 4 of the Enabling Act, by which the Territory of Washington became the State of Washington. It required Washington State to adopt a State Constitution which would "not be repugnant to the constitution of the United States and the principles of the Declaration of Independence." (Presently, more will be said as to the legal effect of this contract between the State of Washington and the United States of America.)

It is clear from the foregoing that the framers of our State Constitution intended that the guarantees of the 7th Amendment to the United States Constitution, as to jury trials, should apply to civil actions in the courts of this state; otherwise the phrase "*shall ever remain inviolate*" would be meaningless. When the framers of our State Constitution stated that the supreme law of the land should be "the constitution of the United States," they meant just that. They were well aware of the complaints the Colonies had against the King of Great Britain.

The jury trial, which is guaranteed to litigants in the courts of this state, was intended to be a thing of *substance*, and not a *mere matter of form*.

In the case at bar, the majority does lip service to the right of trial by jury, but, by its refusal to take cognizance of the sworn evidence in the case, *it strikes down the right of trial by jury*. The evidence quoted in the *dissenting* opinion, and in *this petition for rehearing* demonstrates beyond all cavil that there was substantial medical evidence before the court on every es-

sential issue. We repeat that it is inconceivable to us that the majority can deny the existence of evidence *which a fellow judge quotes at length* in the dissenting opinion. It is apparent that there is something very much wrong in this case.

In *Patterson v. Pennsylvania Railroad Co.* (CCA 6th), 238 F.(2d) 645, the court commented on the problem here involved, stating at page 650:

> "Some of us have noted a modern tendency — perhaps a growing one — *to give mere lip service to these sound principles. Trial by jury is our established constitutional safeguard against assumption of unwarranted judicial authority and should be honored by steadfast observance rather than discarded by dictatorial breach.*" (Emphasis supplied).

The Majority Opinion Has Denied to the Respondents "*Due Process of Law*" and "*Equal Protection of the Laws*" Guaranteed Respondents by the 14th Amendment to the Constitution of the United States

The 14th Amendment to the Constitution of the United States, among other things, provides:

> "* * * nor shall any *state deprive any person* of life, liberty, *or property*, without *due process of law*, nor deny to any person within its jurisdiction the *equal protection of the laws.*" (Emphasis supplied).

A judgment is "property" within the meaning of the above-quoted amendment. See: *Martinez v. Fox Valley Bus Lines, Inc.*, 17 F. Supp. 576 (1936); *Williams v. Atlantic Coast Line Railroad Co.*, 69 S.E. 402, 153 N.C.

360; *Pennsylvania Co. for Insurance on Lives and Granting Annuities v. Scott*, 29 A.(2d) 328; 144 A.L.R. 849.

The 14th Amendment is a *restriction* on the power of a state.

In *Shelley v. Kraemer* (1948) 334 U.S. 1; 3 A.L.R. 2d) 141, the United States Supreme Court, in an opinion written by Justice Vinson, in 3 A.L.R.(2d) at p. 460, said:

> "Similar expressions, giving specific recognition to the fact that judicial action is to be regarded as action of the State for the purposes of the Fourteenth Amendment, are to be found in numerous cases which have been more recently decided. In *Twining v. New Jersey*, 211 U.S. 78, 90, 91, 53 L.ed. 97, 102, 103, 29 S.Ct. 14 (1908), the Court said: 'The judicial act of the highest court of the State, in authoritatively construing and enforcing its laws, is the act of the State.' In *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 680, 74 L.ed. 1107, 1113 (1930), the Court, through Mr. Justice Brandeis, stated: 'The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive or administrative branch of government.' Further examples of such declarations in the opinions of this Court are not lacking."

At page 462:

> "The short of the matter is that from the time of the adoption of the Fourteenth Amendment until the present, *it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference, includes action of state*

courts and state judicial officials. Although, in construing the terms of the Fourteenth Amendment, differences have from time to time been expressed as to whether particular types of state action may be said to offend the Amendment's prohibitory provisions, *it has never been suggested that state court action is immunized* from the operation of those provisions *simply because the act is that of the judicial branch of the state government.*" (Emphasis supplied).

At page 463:

"* * * *State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms. And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands.*" (Emphasis supplied).

At page 464:

"* * * *Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.*" (Emphasis supplied).

The *due process of law* provision thereof, has been held to implement the 1st Amendment to the United States Constitution. See: *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Fiske v. Kansas*, 274 U.S. 380.

It is our contention that in view of the provisions of the Enabling Act, under which Washington became a state, the 14th Amendment also implements the 5th and 7th Amendments of the United States Constitution, which contention we will presently discuss.

Due process of law has to do with substance, and not

form. Recent decisions of the United States Supreme Court have repeatedly, particularly in criminal cases, overthrown judgments of state courts because it has found upon examination that a litigant has been denied *due process of law*.

In *Griffin v. Illinois* (1956) 351 U.S. 958, 76 S.Ct. 585, the United States Supreme Court *squarely held*: that the State of Illinois had denied to Griffin *due process of law*, and the *equal protection of the laws*, to which he was entitled under the 14th Amendment to the Constitution of the United States, when it refused to furnish him (a pauper) at the State's expense, a stenographic transcript of the trial proceedings, *without which* he could not get *appellate review* of claimed errors.

The court's opinion as set out in 76 S.Ct. 585, at 590, states:

> "There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance. It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. See, *e.g.*, *McKane v. Durston* 153 U.S. 684, 687-688, 14 S.Ct. 913, 914-915, 38 L.Ed. 867. But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty. Appellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant. *Consequently*

at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations." (Emphasis supplied).

It a State, *through its judiciary*, violates the 14th Amendment by its failure to furnish a *transcript of the evidence* to a defendant (a pauper), then surely a State *whose highest court refuses to see and consider evidence in a certified statement of facts, violates the 14th Amendment.*

As early as 1886, the United States Supreme Court, in the case of *Yick Wo v. Hopkins*, 118 U.S. 356, at 373, said:

> "*Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.*" (Emphasis supplied).

We think that when the majority of a state court denies the existence of evidence which is in the record, and as the result thereof deprives a litigant of a judgment amounting to more than $80,000.00, that the majority has, without question, deprived such a litigant of *due process of law.*

We realize that in the usual case, the United States Supreme Court will not grant *certiorari* for the purpose of *examining the evidence* before a state court for the purpose of determining the accuracy of the state court in stating that essential evidence was not produced by

such litigant. However, *in this case*, the United States Supreme Court will not be required to examine the evidence to see whether the majority was correct in stating that respondents had failed to present necessary and essential evidence, because the *dissenting opinion* sets out in detail, evidence which the majority insists is missing.

An examination by the United States Supreme Court of the *two* opinions can lead to only one conclusion, *i.e.*, that the *majority* constituted itself a jury, and weighed the evidence, thus depriving respondents of *their right to trial by jury*, as well as denying to respondents *due process of law*.

We think also that an examination of the *two* opinions clearly establishes that in this case, the majority has denied respondents the *equal protection of the laws*.

This is our first opportunity to present to this court our claim of the denial of rights guaranteed us by the United States Constitution, *because we could not anticipate that the members of this court would ignore evidence in the certified statement of facts*. The question of the violation of respondents' constitutional rights under the 14th Amendment, and their deprivation thereof, did not arise until the *majority opinion* was filed on June 18, 1959. We now, *at the first opportunity*, raise this federal question.

In the case at bar, this court *has in effect held that in THIS medical malpractice case, respondent was required to prove her case beyond a reasonable doubt, by medical witnesses who positively and equivocally testi-*

fied that the appellant was negligent and that his negligence was the proximate cause of the respondents' injury and damage.

No such rule of law has ever heretofore existed in this state. Under the prior decisions of this court, no such duty rested upon a plaintiff in a medical malpractice case. Such prior decisions, which sustain respondents' judgment, are not discussed in the majority opinion, *and of course*, not overruled. It is, therefore, *clear that respondents are denied the equal protection of the laws*, and that their *property is to be taken without due process of law.*

The Majority Opinion Denies to Respondents, Rights Guaranteed Them by the 5th and 7th Amendments to the United States Constitution

The above-mentioned Amendments, so far as here material, provide as follows:

Amendment V:

> "No person shall * * * be deprived of life, liberty, *or property without due process of law;* * * * " (Emphasis supplied).

Amendment VII:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, *the right of trial by jury shall be preserved*, and *no fact tried by a jury shall be otherwise re-examined in any court of the United States* than according to the rules of the common law." (Emphasis supplied).

Congress passed, and the President on February 22, 1889 approved, the Enabling Act which permitted

Washington to become a State. Section 4 thereof, among other things, provides as follows:

> "That the delegates to the conventions * * * after organization shall declare, on behalf of the people of said proposed states, that they adopt the constitution of the United States; whereupon the said conventions shall be, and are hereby, authorized to form constitutions and state governments, for said proposed states respectively. The constitutions shall be republican in form, and make no distinction in civil or political rights on account of race or color, except as to Indians not taxed, and *not be repugnant to the constitution of the United States and the principles of the Declaration of Independence.*" (Emphasis supplied).

The Declaration of Independence (July 4, 1776) so far as here material, provides:

> "* * * The history of the present king of Great Britain is a history of *repeated* injuries *and usurpations*, all having in direct object the establishment of an absolute tyranny over these states. To prove this, let facts be submitted to a candid world.
>
> * * *
>
> "*For depriving us, in many cases of the benefits of trial by jury:* * * * (Emphasis supplied).

In *Boeing Aircraft Co. v. R.F.C.*, 25 Wn.(2d) 652, this court, in discussing the Enabling Act and Washington's admission to the Union, at page 658, said:

> "It is our conclusion that the question in this case must be resolved in favor of the imposition of the tax for two reasons: first, *because of the provisions of the enabling act which provided for the admission of this state into the Union.* That act at first

had no binding effect, for it was no more than a proposition or offer of a contract. *However, after the state had accepted the terms of the enabling act by framing and passing a constitution, and Congress had approved the constitution, and the president of the United States had issued a proclamation to the effect, each government was bound by the provisions of that enabling act.*" (Emphasis supplied).

Washington became a State on November 11, 1889. The framers of our State Constitution were keenly aware of the problem which brought about the adoption of the 14th Amendment. They knew of the Bill of Rights (Amendments I to X). As a condition to admission to the Union, Washington was required to adopt a Constitution which was consistent with the principles of the Declaration of Independence. One of those principles was the "benefits of trial by jury." Also, Washington was required to adopt a Constitution "not * * * repugnant to the Constitution of the United States."

Washington complied by providing in Article I, Section 2, "The Constitution of the United States is the *Supreme* law of the land." Thus Washington, *by contract* with the United States of America, adopted the United States Constitution and all of its amendments. *Therefore, the provisions of the 5th and 7th, as well as the 14th, Amendments, became binding upon the judiciary of the State of Washington, and upon the United States of America.*

Respondents claim that their rights under all of said Amendments have been violated by the majority opinion filed June 18, 1959, at which time a Federal question

first became apparent in this case. The acts constituting the claimed violations have been hereinbefore set out.

The rules of this court which require that a Petition for Rehearing be filed within *thirty* days, have, because of the nature of the *majority opinion*, required a combing of 1623-pages of evidence. Hence, time was not available to carefully prepare, and include herein an extended brief on the constitutional questions presented. If the court desires such a brief, it no doubt will call for one under the provisions of the last paragraph of Rule 50, Rules on Appeal.

APPENDIX E

SUPREME COURT OF THE STATE OF WASHINGTON

ROY E. RICHISON, *et ux.*, RESPONDENTS, v. DR. LESLIE L. NUNN, *et ux.*, APPELLANTS. No. 34496.

Filed Supreme Court State of Washington '60 Jan 13 PM 1:37 Robert Holstein, Clerk

ORDER DENYING PETITION FOR REHEARING

The court having considered the respondents' petition for a rehearing herein, the appellants' answer to the respondents' petition, and the respondents' reply to the appellants' answer,

IT IS ORDERED that the petition for rehearing be and it is hereby denied.

Dated this 13th day of January, 1960.

By the Court:

FRANK P. WEAVER, *Chief Justice*

[CERTIFIED COPY IS IN THE RECORD].

APPENDIX F

SUPREME COURT OF THE STATE OF WASHINGTON
ROY E. RICHISON, *et ux.*, RESPONDENTS, v. DR. LESLIE L. NUNN, *et ux.*, APPELLANTS. No. 34496.

ORDER STAYING PROCEEDINGS

Filed Supreme Court State of Washington '60 Mar 7 PM 2:08 Robert Holstein, Clerk

Respondents having filed herein their motion for "Stay of Proceedings" pending final determination by the United States Supreme Court of their "Petition for a Writ of Certiorari" (to be filed with the United States Supreme Court), directed to this court with respect to the decision of this court filed on June 18, 1959, upon which the Final Judgment of this court was, or will be, entered on March 8, 1960; and it appearing to the court that respondents' aforesaid motion should be granted as hereinafter provided; the court does now,

ORDER that respondents' aforesaid motion be and the same is hereby granted.

ORDER that the clerk of this court shall not send the remittitur of this court to the clerk of the Superior Court of the State of Washington for Clark County, until the Certiorari proceedings before the United States Supreme Court shall have been finally determined by that court. This order does not in any way affect the finality of the aforesaid judgment entered in this court pursuant to the aforesaid decision of this court, and the same is and shall be construed as the Final Judgment of this court.

ORDER that all proceedings on said judgment are hereby stayed until the Certiorari proceedings before

the United States Supreme Court are finally determined by that court.

ORDER that this court shall and it does hereby retain jurisdiction of this cause until final disposition by the Supreme Court of the United States of the aforesaid Certiorari proceedings; that if a Writ of Certiorari is not granted by the United States Supreme Court, or if granted by the United States Supreme Court and affirmed by that court, the clerk of this court, upon proper and official notification of the final determination of the United States Supreme Court, shall call the same to the attention of the Chief Justice of this court, who will then make the proper order with respect to a remittitur from this court to the aforesaid Superior Court.

ORDER that the Stay hereinabove provided for is conditioned upon respondents filing in this court, within 10 days after the entry of this Order, a surety bond in the sum of $150.00, or depositing with the clerk of this court, in lieu thereof, cash in the sum of $150.00, conditioned:

> "that if respondents fail to make application to the United States Supreme Court for a Writ of Certiorari within the period allotted therefor by the rules of the United States Supreme Court, or fail to obtain an order granting their application for a Writ of Certiorari, or fail to make their plea good in the United States Supreme Court, they shall answer for all damages and costs which appellants may sustain by reason of the Stay hereinabove ordered:"

ORDER that the clerk of this court shall not in any event send the remittitur of this cause to the Superior Court of the State of Washington for Clark County

until 10 days shall have elapsed after the entry of this Order.

DATED this 7th day of March, 1960, in the Temple of Justice, Olympia, Washington.

FRANK P. WEAVER, *Chief Justice*

Presented by:

JOHN J. KENNETT
Of Attorneys for Respondents.

[CERTIFIED COPY IS IN THE RECORD]

APPENDIX G

SUPREME COURT OF THE STATE OF WASHINGTON
ROY E. RICHISON, *et ux.*, RESPONDENTS, v. DR. LESLIE L. NUNN, *et ux.*, APPELLANTS. No. 34496.

Excerpts from Appellants' (Respondents here) Answer to Petitioners' Petition for Rehearing

Page 1:

> "At the outset, we submit respondents' impassionate 'introductory statement' (Pet. 1-3) and the threats contained on page 65 have no bearing on the questions now before this court and are entitled to no consideration in the disposition of the petition."

Page 22:

> "As we stated at the beginning of this answer, we submit the threat set up by respondents on pages 60 through 68 of their petition has no bearing on the questions now before the court. To recognize and be bound by it would overthrow the long established practice of this and other similar courts in the various states."

[The Answer to petitioners' Petition for Rehearing from which said excerpts are taken, appears in the certified record before this court.]

APPENDIX H

SUPREME COURT OF THE STATE OF WASHINGTON

ROY E. RICHISON, *et ux.*, RESPONDENTS, v. DR. LESLIE L. NUNN, *et ux.*, APPELLANTS. No. 34496.

ORDER DIRECTING CLERK TO TRANSMIT TO THE CLERK OF THE UNITED STATES SUPREME COURT THE ENTIRE ORIGINAL FILE IN THIS CAUSE

WHEREAS, respondents above named are about to file with the clerk of the United States Supreme Court their Petition for Certiorari, seeking a review of the judgment of this court entered herein on March 8, 1960; and,

WHEREAS, under the practice of this court, the record before this court on appeal is not a printed record, except for the briefs of the parties; and,

WHEREAS, the record before this court on appeal, in this case, is voluminous, and the time required to make copies thereof is such as to make it impossible to accomplish the same within the time allowed respondents, by law, to file the transcript of record with the clerk of the United States Supreme Court; and it appearing that it is therefore necessary and proper that the entire original file in this cause be transmitted by the clerk of this court, under his proper certificate, to the clerk of the United States Supreme Court;

NOW, THEREFORE, in consideration of the foregoing,

It is hereby ORDERED AND DIRECTED that the clerk of this court shall promptly:

(a) Forward by registered mail to the clerk of the United States Supreme Court, Washington, D.C., the entire original file in this cause;

(b) Forward with said original file, his proper certificate, under the seal of this court, certifying that the file as transmitted contains the entire record of this court in this cause;

(c) Furnish to John J. Kennett, attorney of record herein for respondents, original and four copies of a list, itemizing the documents transmitted to the clerk of the United States Supreme Court pursuant to the foregoing paragraph.

It is further ORDERED that the clerk of this court advise the above-mentioned attorney of the cost of transmitting said file to the clerk of the United States Supreme Court, and the said attorney is hereby ordered to forthwith pay to the clerk of this court, twice such amount so as to insure the proper transmission of said file to said court and the return thereof from said court to this court.

It is further ORDERED that said attorney shall be obligated to pay such further sums, if any, as demanded by the clerk of this court to insure the proper and safe return of said file to this court.

It is further ORDERED that a certified copy of this order shall be included in said original file.

Done in Chambers at the Temple of Justice, Olympia, Washington, this 20th day of May, 1960.

FRANK P. WEAVER

Chief Justice of the Washington State Supreme Court

[CERTIFIED COPY IS IN THE RECORD]

FILE COPY

Office-Supreme Court, U.S.
FILED
JUN 20 1960
JAMES R. BROWNING, Clerk

In the
Supreme Court of the United States

OCTOBER TERM, 1959

ROY E. RICHISON and VERA RICHISON, his wife, *Petitioners*,
vs.
DR. LESLIE L. NUNN and ELIZABETH NUNN, his wife, *Respondents*.

No. 119

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR RESPONDENTS IN OPPOSITION

ROBERT T. MAUTZ
Board of Trade Building
Portland 4, Oregon

DALE McMULLEN
CLAUDE C. SNIDER
ROBERT D. McMULLEN
211 Central Building
Vancouver, Washington
Counsel for Respondents

PIONEER PRINTING VANCOUVER, WASH.

In the
Supreme Court of the United States

OCTOBER TERM, 1959

ROY E. RICHISON and VERA RICHISON, his wife, *Petitioners*,

vs.

DR. LESLIE L. NUNN and ELIZABETH NUNN, his wife, *Respondents*.

No. 977

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR RESPONDENTS IN OPPOSITION

ROBERT T. MAUTZ
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In the
Supreme Court of the United States

OCTOBER TERM, 1959

ROY E. RICHISON and VERA RICHISON, his wife, *Petitioners*,

vs.

No. 977

DR. LESLIE L. NUNN and ELIZABETH NUNN, his wife, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR RESPONDENTS IN OPPOSITION

Petitioners are seeking a review of the judgment of the Supreme Court of the State of Washington in the case of Richison vs. Nunn, case number 34496 of the Washington State Supreme Court, which judgment appears in 154 Washington Decisions 365.

Respondents herewith present their brief in opposition to aforesaid petition.

CLAIMS OF PETITIONERS

The petition attempts to set up five main points:

1. A denial of due process of law (Fourteenth Amendment);

2. A denial of equal protection of the laws;

3. Denial of the right of trial by jury;

4. Deprivation of Petitioners of their property without due process of law; and

5. Abridgment of their privileges and immunities as citizens of the United States, in violation of the Fourteenth Amendment to the Federal Constitution.

RESPONDENTS' POSITION

It is the position of the Respondents that the writ of certiorari should not be granted for the following reasons:

1. The petition presents no federal question, and,

2. The Petitioners have not been denied their constitutional rights.

BASIC FACTS

The basic facts are as follows: The Petitioners herein filed an action for malpractice against the Respondents, Dr. Leslie L. Nunn and Elizabeth Nunn, in the Superior Court of Clark County, Washington. All parties were residents of Washington. In due time the cause was tried and a verdict was rendered against the Respondents. Judgment was duly entered, and within the required time notice of appeal to the Supreme Court of Washington was given. Briefs were filed and the appeal was argued. The Supreme Court of Washington reversed the trial court. There were six justices for reversal and three for affirmance.

The Washington State Supreme Court held that the plaintiffs (Petitioners herein), had failed to sustain the

burden of proving that Mrs. Richison's disability was the result of the defendants' negligence, and the judgment was reversed.

The Petitioners filed a petition for rehearing which, in due course, was denied.

At a later date the Petitioners herein filed their petition for writ of certiorari in the United States Supreme Court, seeking to get a review of the aforementioned Washington case.

The Court will see that this matter is a usual tort case, tried in the state courts with ordinary local litigants, and of no special importance to the public. No public question is involved.

UNDER WHAT CONDITIONS WILL CERTIORARI BE GRANTED?

Rule 19 of the United States Supreme Court is as follows:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, which neither controlling nor fully measuring the Court's discretion, indicate the character of reason which will be considered: (a) Where a state court has decided a Federal question of substance not theretofore determined by this Court or has decided it in a way probably not in accord with the applicable decisions of this Court."

THERE MUST BE A FEDERAL QUESTION (It must be substantial)

To give a Federal court jurisdiction of a cause on ground that a Federal question is involved, there must be a Federal

question, not in form but in substance. *Hudson Motor Car Co. vs Detroit*, 136 Fed. 2d 574, 576; *Brasuall vs McGowan*, 32 Fed. Supp. 678; *Cuyahoga River Power Co. vs Northern Traction Co.*, 252 U.S. 388.

In *Rice vs Sioux City Memorial Cemetery*, 349 U.S. 70, 80, this Court held certiorari should not be granted except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority. Review by certiorari is in the interest of the law, its appropriate expedition and enforcement, not in the mere interest of the litigants. Upon rehearing certiorari was dismissed as improvidently granted. See also *Monrosa vs Carbon Black Co.*, 359 U.S. 180.

"We do not grant certiorari to review evidence and discuss specific facts". Mr. Justice Holmes in the case of *United States vs Johnston*, 268 U.S. 220, 227.

In the case of *Dick vs New York Life Insurance Co.*, 359 U.S. 437, 450, Mr. Justice Frankfurter quoted with approval Mr. Justice Stone in an earlier case, *Washington Fidelity National Insurance Co. vs Burton*, 287 U.S. 97, as follows:

> "It thus appears that the construction of the statute which we were asked to review is not in the case, and even if it were, it is of local significance only. The conflict of decisions asserted is not shown. Plainly the question is not of such general interest or importance as, under the rules and practice of this Court, warrants its review upon certiorari. For these reasons it is the duty of this Court to dismiss the writ as improvidently granted."

Cases which raised as their sole question the sufficiency of the evidence for submission to a jury were not regarded as complying with the standards necessitated by the purpose of the rule for limiting the power of review by certiorari. *Dick vs New York Life Insurance Co.* (1958), 359 U.S. 450-451.

DENIAL OF DUE PROCESS OF LAW

The Seventh Amendment to the United States Constitution, "Trial By Jury in Civil Cases", states: "In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

The Seventh Amendment to the United States Constitution does not limit the states, but does limit the United States. See *Wagner Co. vs Lyndon*, 262 U.S. 226.

The deprivation of a right of trial by jury in a state court does not deny the parties due process of law under the Federal Constitution. *Wagner Co. vs Lyndon*, 262 U.S. 226; *Walker vs Sauveist*, 92 U.S. 90; *Missouri vs Lewis*, 101 U.S. 22, 31; *Twining vs New Jersey*, 211 U.S. 78, 110-111; *Minneapolis & St. Louis Railway Co. vs Bomboli*, 241 U.S. 211, 217.

The machinery for review of judgment of a court of first instance is wholly within the control of the state legislature. *Missouri vs Lewis*, 101 U.S. 22, 30.

The Fourteenth Amendment to the United States Constitution says: ". . . nor shall any state deprive any person

of life, liberty or property without due process of law."

In application of the Fourteenth Amendment, the duty of the Supreme Court does not go beyond safeguarding rights essential to a fair hearing by the state. *Foster vs Illinois*, 332 U.S. 134.

Protection of the Fourteenth Amendment can be invoked only if a state deprives any person or denies enforcement of a right guaranteed. *Rice vs Sioux City Memorial Cemetery*, 349 U.S. 70.

In each case "due process of law" requires an evaluation based on a disinterested inquiry pursued in a spirit of science, or a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, on a judgment not in ad hoc and episodic, but duly mindful and reconciling the needs both of continuity and of change in a progressive society. *Rochin vs California*, 342 U.S. 165; *Wolf vs Colorado*, 338 U.S. 25.

EQUAL PROTECTION OF THE LAWS

The Fourteenth Amendment to the United States Constitution states as follows: ". . . nor deny to any person within its jurisdiction the equal protection of the laws."

So long as a law applies to all alike, the requirements of "equal protection of the law" are met. See *Francis vs Resweber*, 329 U.S. 459; rehearing denied 330 U.S. 853.

Protection of the Fourteenth Amendment can be invoked only if the state deprives any person or denies enforcement of a right guaranteed. *Rice vs Sioux City Memorial Cemetery*, 349 U.S. 70.

The concept of "equal protection of the law" and "due

process" both stem from the American ideal of fairness, and are not mutually exclusive, nor are the concepts always interchangeable, in that equal protection of the laws is a more explicit safeguard of prohibited unfairness than it is due process of law. *Bolling vs Sharp*, 347 U.S. 497; *Barrons vs Jackson*, 346 U.S. 249.

RIGHT OF TRIAL BY JURY

The guarantees of jury trial contained in the Federal Constitution, and in the Sixth Amendment thereto, are limitations solely on the powers of the Federal Government and trial by jury may be modified by a state, or even abolished altogether. See USCA, Constitution, Article III, Section 2; also the Sixth Amendment; also *City of Bellingham vs Hite*, 37 Wash. 2d 652, 225 P. 2d 895.

The function of the Supreme Court under the Fourteenth Amendment relating to juries is not to prescribe procedures, but it is essentially to protect the integrity of the trial process by whatever method the state sees fit to employ. *Fay vs People*, 332 U.S. 261.

DEPRIVING ONE OF PROPERTY WITHOUT DUE PROCESS

Want of due process under the Federal Constitution is not established by showing that the decision complained of was erroneous. See *Shematis vs Reid*, 193 Fed. 2d 119.

The Federal Constitution does not guarantee uniformity of decisions by state courts. *Kenny vs Fox*, 132 Fed. Supp. 305.

"Due process of law" requires not only opportunity for presentation of evidence and cross-examination of witnesses,

but also opportunity for argument. *L. B. Wilson Co. vs Federal Communications Commission*, 170 Fed. 2d 793.

The Federal Constitution does not guarantee a citizen against loss through erroneous decisions of the state courts. *Kenny vs Fox*, 132 Fed. Supp. 305, affirmed 232 Fed. 2d 288.

The dismissal of an appeal from a money judgment by a state appellate court, as a reasonable measure for safeguarding the collectibility of that judgment, does not violate the due process clause or the equal protection clause of the Fourteenth Amendment; and upon the facts in the case the state appellate court's dismissal of Petitioner's appeal was a reasonable measure. *National Union vs Arnold*, 348 U.S. 37.

An erroneous judicial ruling does not necessarily amount to deprivation of due process of law, since an erroneous decision of law or fact does not deprive the unsuccessful party of property without due process of law. See *Arrowsmith vs Harmoning*, 118 U.S. 194.

Due process of law does not mean infallible process of law. *Commercial Insurance Co. vs Ramos*, 243 Fed. 2d 488; *Schechtman vs Foster*, 172 Fed. 2d 339.

Appellate review is not of the essence of due process. See *In Re Josephson*, 218 Fed. 2d 174, 181; *McKane vs Durston*, 153 U.S. 684.

Parties obtain no vested rights in the orders or judgments of courts while they are subject to review. *American Steel Foundry Co. vs Tri-City Central Trade Council*, 257 U.S. 184; *Boardwalk & Seashore Co. vs Murdock*, 286 New York 494.

The reversal of a judgment by any competent authority restores the parties litigant to the same condition in which they were prior to its rendition. The judgment reversed becomes a mere waste paper. See *II Freeman on Judgments*, (5th Edition), 2416, Section 1167.

There is authority that a judgment is not a vested right until the term at which the judgment was rendered ends, and that no vested right exists in a judgment while it is subject to review or while an appeal therefrom is pending. See *30A American Jurisprudence*, 162, Judgments, Section 6.

ABRIDGING PRIVILEGES AND IMMUNITIES OF CITIZENS OF THE UNITED STATES

The Fourteenth Amendment to the Constitution of the United States is as follows: "No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States."

"Privileges and immunities" means a favor granted; a special privilege; a privilege or favor not granted to others. See *16A, Corpus Juris Secundum*, 169, Constitutional Law, Section 458.

The Fourteenth Amendment does not forbid all discrimination or inequality, and certain privileges may be granted some and denied to others, under some circumstances, if they be granted or denied on the same terms and if there exists a reasonable basis therefor.

The "privileges and immunities" protected by this clause of the Constitution are only those which owe their existence to the Federal Government, its national character, its constitution, or its laws, and not such rights as accrue from state

citizenship. See 16A, C.J.S., 169, Constitutional Law, Section 458. See also *Maxwell vs Dow*, 176 U.S. 581. See also 33 Words and Phrases (Permanent Edition) 780-781.

The "privileges and immunities" of citizens of the United States protected by the Constitution, Amendment Fourteen, Section 1, providing that no state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, are those which arise out of the nature and essential character of the national government, the provisions of its constitution or its laws and treaties made in furtherance thereof. See 33 Words and Phrases (Permanent Edition) 780-781.

The guarantee contained in Article IV, Section 2, of the Federal Constitution, protects only citizens of a state in their natural capacity, and applies only to persons, not to things. It requires each state to accord to citizens of other states the "privileges and immunities" to which its own citizens are entitled, but does not operate as a limitation of a state's authority over its own citizens, or give those citizens of other states greater privileges in a particular state than those enjoyed by its own citizens. See 16A CJS, 166, Constitutional Law, Section 457.

The cases of *Davis vs Virginia Railway Co.*, 361 U.S. 354, decided January 25, 1960, and *Sentilles vs Inter-Carribean Corp.*, 361 U.S. 107, decided November 23, 1959, have been cited by Petitioners. Davis asked for certiorari to the supreme court of appeals of Virginia and Sentilles sought certiorari to the court of appeals of the Fifth Circuit.

Each case had a Federal question; Davis, construction of the Federal Employers Liability Act; Sentilles was a suit by

a seaman under the Jones Act, martime law, an Act of Congress. Certiorari was allowed in each case, although there were several Justices who felt that the writs should not issue or that the writs were improvidently granted.

In the Davis case there were two claims. One, for negligence upon the part of the employer, and, two, for malpractice on the part of a doctor for the employer. The Court reversed the state court on the first ground of negligence and affirmed the state court on the malpractice. It is evident that certiorari would never have been granted if the only question had been on the malpractice phase.

The majority opinion, at page 358, stated: "This offer of proof was fatally deficient. No foundation was laid as to the recognized medical standards for the treatment of such a fracture. No standard having been established, it follows that the offer of proof was not sufficient. The trial judge, therefore, was correct in declining to submit the malpractice claim to the jury."

In Sentilles, supra, an action under the Jones Act for negligence, plaintiff was a seaman and claimed to have been injured. There was a Federal question, a construction of a Federal act. The case hinged around medical testimony as to cause of injury. Several Justices felt the United States Supreme Court should not be hearing this type of case. Mr. Justice Stewart said: "The case should not be in the Supreme Court to review individualized personal injury cases in which the sole issue is sufficiency of the evidence."

Mr. Justice Harlan concurred with Mr. Justice Stewart. Mr. Justice Frankfurter said: "We do not grant certiorari to review evidence and direct specific facts."

Let us refer now to page 23 of the petition, wherein Petitioners contend that a judgment is property under the Fourteenth Amendment. In all cases therein cited, the period of appeal had expired and judgments became vested. In the instant case the appeal was perfected by the Respondents herein (Defendants-Appellants in the state court). There never was a vested right in the Petitioners in the judgment. The judgment below was not such a property right under the Fourteenth Amendment. A judgment reversed becomes merely a scrap of paper; the reversed judgment was never vested and did not become property.

THERE IS NO FEDERAL QUESTION INVOLVED IN THE INSTANT CASE

The numerous cases cited by counsel in Petitioners' brief have been examined and are not detrimental to the Respondents' views in the instant case on the basis of facts. The many cases cited by Petitioners allowing certiorari had a Federal question, such as involving a Federal statute; state statutes involving a Federal question; substantial constitutional questions involving the Federal constitution; matters of large public concern, all cases which the Supreme Court of the United States is required to supervise. In the instant case the parties are local and the issues involved are of interest only to the litigants. This case should not take up the time and the energy of the United States Supreme Court; it is of a local nature; there is no Federal question in the instant case.

The United States Supreme Court, in deciding the question of certiorari, must analyze the facts of the case. The mere fact that the Petitioners window dress the case up

with high-sounding constitutional expressions does not bind the Court. The Court must look through the maze of constitutional words and examine the basic facts. The case of *Dick vs New York Life Insurance Co.*, 359 U.S. 437, 450, and *Fidelity National Insurance Company vs Burton*, 287 U.S. 97, are good examples of petitions for writs of certiorari which contain expressions which went beyond the facts of the case. There is no principle in this case involving public rights or matters of public importance.

Assuming for the sake of argument that there is a Federal question, in the case of *Rice vs Sioux City Memorial Cemetery*, 349 U.S. 70, the Supreme Court said: "The Supreme Court will not review a state court decision, even though a Federal question is involved, if the decision rests on an adequate state ground, but the Court itself will determine whether the state ground relied on is adequate." The case at bar was certainly tried and heard on an adequate state basis.

PETITIONERS HAVE NOT BEEN DEPRIVED OF THEIR CONSTITUTIONAL RIGHTS

The Petitioners received a trial in accordance with the laws and procedures of the state of Washington. Every right was extended them. They were given the opportunity to present their case to the trial court and jury. The law of Washington required them, in a malpractice case, to establish their case in accordance with the principles of proof established by the Supreme Court of the State of Washington in the case of *Fritz vs Horsfall*, 24 Wn. (2d) 14 at 16, 17.

"(4) Before a physician or surgeon can be held liable

for malpractice, he must have done something in the treatment of his patient which the recognized standard of medical practice in his community forbids in such cases, or he must have neglected to do something required by those standards. 48 C.J. 112

"(5) In order to sustain a judgment against a physician or surgeon, the standard of medical practice in the community must be shown, and, further, that the doctor failed to follow the methods prescribed by that standard.

"(6) It is not required that physicians and surgeons guarantee results, nor that the result be what is desired. *Williams v. Wurdemann*, 71 Wash. 390, 128 Pac. 639; *Lorenz v. Booth*, 84 Wash. 550, 147 Pac. 31; *Dishman v. Northern Pac. Beneficial Ass'n*, 96 Wash. 182, 164 Pac. 943; *Howatt v. Cartwright*, 128 Wash. 343, 222 Pac. 496; *Barker v. Weeks*, 182 Wash. 384, 47 P. (2d) 1.

"(7) The testimony of other physicians that they would have followed a different course of treatment than that followed by defendant, or a disagreement of doctors of equal skill and learning as to what the treatment should have been, does not establish negligence. In such cases, the court must hold that there is nothing upon which the jury may pass, the reason being that the jury may not be allowed to accept one theory to the exclusion of the other. *Howatt v. Cartwright*, 128 Wash. 343, 222 Pac. 496; *Kemp v. McGillivray*, 129 Wash. 592, 225 Pac. 631; *Hollis v. Ahlquist*, 142 Wash. 33, 251 Pac. 871; *Peterson v. Hunt*, 197 Wash. 255, 84 P. (2d) 999.

"(8) Negligence on the part of the physician or surgeon by reason of his departure from the popular standard of practice must be established by medical testimony. *Wharton v. Warner*, 75 Wash. 470, 135

Pac. 235; *Dahl v. Wagner*, 87 Wash. 492, 151 Pac. 1079; *Dishman v. Northern Pac. Beneficial Ass'n*, 96 Wash. 182, 164 Pac. 943; *Howatt v. Cartwright*, 128 Wash. 343, 222 Pac. 496; *Brear v. Sweet*, 155 Wash. 474, 284 Pac. 803; *Jordan v. Skinner*, 187 Wash. 617, 60 P. (2d) 697; *Peterson v. Hunt*, 197 Wash. 255, 84 P. (2d) 999; *Hoover v. Goss*, 2 Wn. (2d) 237, 97 P. (2d) 689; *Peddicord v. Lieser*, 5 Wn. (2d) 190, 105 P. (2d) 5; *Crouch v. Wyckoff*, 6 Wn. (2d) 273, 107 P. (2d) 339."

The evidence necessary for Petitioners to prevail was not presented. The Washington supreme court, in effect, said that the Petitioners (plaintiffs) failed to put on sufficient evidence to allow the case to go to the jury. This is not a Federal question, nor is it a constitutional matter.

There was no denial of equal protection of the laws. The case of *Francis vs Resweber*, 329 U.S. 459, and 330 U.S. 853, is authority for the rule that, "So long as a law applies to all alike, the requirements of equal protection of the laws are met." Certainly nothing can be shown in the record that this rule was violated.

As to the right of trial by jury, the error was made by Petitioners (plaintiffs) in that they did not prove their case. The state supreme court took the case from the jury because plaintiffs did not make the necessary proof. This is done by the trial judge quite frequently on motions for directed verdict.

The Petitioners have not been deprived of their property without due process of law. It seems that the Petitioners have taken the view that the judgment appealed from was property under the Fourteenth Amendment. Respondents

submit that the United State Supreme Court, in *American Steel Foundry Co. vs. Tri-City Central Trade Council*, 257 U.S. 184, has ruled that parties obtain no vested rights in the orders or judgments of courts while they are subject to review. Appellate review is not of the essence of due process. See *McKane vs Durston*, 153 U.S. 684.

The reversal of a judgment by any competent authority restores the parties litigant to the same conditions in which they were prior to its rendition. The judgment reversed becomes mere waste paper. See II Freeman on Judgments (5th Edition) 2416, Section 1167.

The Petitioners' privileges and immunities as citizens of the United States have not been violated under the Fourteenth Amendment. The Fourteenth Amendment does not forbid all discrimination or inequality, and certain privileges may be granted some and denied to others, under some circumstances, if they be granted or denied on the same terms and if there exists a reasonable basis therefor. The privileges and immunities protected by this clause of the Constitution are only those which owe their existence to the Federal Government, its national character, its constitution, or its laws, and not such rights as accrue from state citizenship. See *Maxwell vs. Dow*, 176 U.S. 581..

Having answered the petition filed herein, it is respectfully submitted that the petition for certiorari be denied.

Respectfully submitted,

ROBERT T. MAUTZ,
DALE McMULLEN,
CLAUDE C. SNIDER
ROBERT D. McMULLEN,
Counsel for Respondents.